STATE OF WISCONSIN | CIRCUIT COURT BRANCH 11 | DANE COUNTY

JULAINE K. APPLING,
JO EGELHOFF,
JAREN E. HILLER,
RICHARD KESSENICH, and
EDMUND L. WEBSTER,

Plaintiffs,

DECISION AND ORDER

vs.

JAMES E. DOYLE,
KAREN TIMBERLAKE, and
JOHN KIESOW,

Case No. 10-CV-4434

Defendants,

and

FAIR WISCONSIN, INC.,
GLENN CARLSON & MICHAEL CHILDERS,
CRYSTAL HYSLOP & JANICE CZYSCON,
KATHY FLORES & ANN KENDZIERSKI,
DAVID KOPITZKE & PAUL KLAWITER, and
CHAD WEGE & ANDREW WEGE,

Intervening Defendants.

This is a Decision and Order regarding Intervening Defendants' and Plaintiffs' cross-motions for summary judgment. For the reasons discussed below, Intervening Defendants' motion for summary judgment is **GRANTED** and Plaintiff's motion for summary judgment is **DENIED**.

BACKGROUND

I. Facts

On August 1, 2009, Wis. Stats. Chapter 770, which created the Domestic Partner Registry for same-sex couples, went into effect. Claiming to be injured because they are taxpayers, Plaintiffs challenge Chapter 770 as unconstitutional under Article VII, Sec. 13 of the Wisconsin Constitution (hereinafter referred to as the "Marriage Amendment"), alleging that the status created by Chapter 770, that is, the status of "domestic partnership," is "substantially similar to that of marriage."

II. Parties

All Plaintiffs are adult residents and taxpayers of the State of Wisconsin. (Compl. ¶¶ 3-4). Prior to or during the legislative approval process and ratification campaign the Marriage Amendment, Plaintiff Julaine K. Appling was the President of Wisconsin Family Action ("WFA"), a Wisconsin not-for-profit organization engaged in public education and advocacy supporting approval and ratification of the Amendment. (*Id*.; Appling Aff. ¶¶ 1-2, March 8, 2011). Appling also served as chief executive officer of the Family Research Institute of Wisconsin ("FRI") (n/k/a "Wisconsin Family Council"), a Wisconsin not-for-profit organization engaged in public education regarding family and social issues. (Appling Aff. ¶ 3). Appling also served as director for the Vote Yes For Marriage referendum campaign advocating for ratification of the Amendment, as well as director of Wisconsin Coalition for Traditional marriage, a Wisconsin not-for-profit organization engaged in public education regarding family and marriage issues. (*Id*. at ¶¶ 4, 5) Prior to or during the legislative approval process and ratification campaign of the Marriage Amendment, Plaintiffs Jo Egelhoff, Jaren E. Hiller, Richard Kessenich, and Edmund L. Webster were members of WFA's board of directors. (Compl. ¶ 4*)*.

Defendant James E. Dolye was the Governor of the State of Wisconsin at the time this action was filed.[1] (*Id*. at ¶ 5). Also at the time this action was filed, Defendant Karen Timberlake was Secretary of the Wisconsin Department of Health Services. (*Id*. at ¶ 6). At the time this action was filed, Defendant John Kiesow was the Wisconsin Registrar of Vital Statistics, which is an office of the Wisconsin Department of Health Services.[2] (*Id*. at ¶ 7).

On December 8, 2010, Fair Wisconsin Inc. ("Fair Wisconsin")[3] and its members Glenn Carson, Michael Childers, Crystal Hyslop, Janice Czyscon, Kathy Flores, Anne Kendzierski, David Kopitzke Paul Klawiter, Chad Wege, and Andrew Wege (collectively referred to as "Intervening Defendants") were granted leave to intervene in this lawsuit.

III. Procedure

Government Defendants filed a motion for summary judgment on December 22, 2010, and Plaintiffs filed a cross-motion for summary judgment on March 8, 2011.

Also on March 8, 2011, Intervening Defendants filed a motion for summary judgment in which they joined in Government Defendants' motion and incorporated by reference the arguments presented in Government Defendants' brief. However, on May 13, 2011, Government Defendants filed a motion to withdraw from the case or amend their Answer, stating that their position under the new administration was consistent with that of the Plaintiffs. On June 1, 2011, a telephone hearing was held regarding the motion. The court determined that Government Defendants would remain in the case, noted that their position had changed and did not require them to submit any further materials. (Mot. Hr'g. Tr. 5: 6-13, 9:15-18).[4] The court also found that because Intervening Defendants had previously joined in Government

[1] In January of 2010, Governor Scott Walker became governor of Wisconsin.
[2] Defendants Doyle, Timberlake, and Kiesow hereinafter will collectively be referred to as "Government Defendants."
[3] Fair Wisconsin is a statewide non-profit membership organization dedicated to advancing and protecting the civil rights of lesbian, gay, bisexual and transgendered people.
[4] The court stated it would note in this Decision that Government Defendants' position is now aligned with Plaintiffs'. (Mot. Hr'g. Tr. 5:6-13).

Defendants' summary judgment motion, the substance of that motion was incorporated by reference in Intervening Defendants' filing.

On April 14, 2011, this court granted Katharina Heyning, Judith Trampf, Wendy Woodruff, Jayne Dunnum, Jayne Dunnum, Robin Timm, Virginia Wolf, Carol Schumacher, Diane Schermann, Michelle Collins, American Civil Liberties Union ("ACLU") and the ACLU of Wisconsin, Inc.'s motion for leave to file a brief as Amicus Curiae on issues related to the pending motions for summary judgment. Amicus Curiae filed a brief on May 20, 2011.

Subsequently, the parties completed the briefing schedule as ordered.

ANALYSIS

I. Summary judgment standard

Under Wis. Stat. §802.08(2), the moving party shall be granted judgment as a matter of law where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." The court can render summary judgment on liability alone, if there is a genuine issue as to damages. *See id.*

In a summary judgment motion, the Court must first determine whether a claim or defense has been stated. *See Dziewa v. Vossler*, 149 Wis. 2d 74, 77, 438 N.W.2d 565 (1989). Next, the court must establish whether the moving party has made a prima facie case for summary judgment through affidavits and other proof. All reasonable inferences should be drawn in the light most favorable to the non-moving party. *See Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). Cross-motions for summary judgment require that the reviewing court examine each party's motion individually. *City of Edgerton v. General Casualty Co.,* 172 Wis. 2d 518, 529, 493 N.W.2d 768 (Ct. App. 1992).

"Summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy." *Id*. at 338. If the opposing party can successfully establish that there are disputed issues of fact, competing reasonable inferences surrounding the facts would lead to opposite results, or that the law does not support the moving party's recovery even on facts not in dispute, the court must deny the summary judgment motion. *See Schroeder, Gelden, Riester & Moerke v. Schoessow*, 103 Wis. 2d 38 (Ct. App. 1981), reversed on other grounds, 108 Wis. 2d 49 (1982).

II. Standing

The first issue is whether Plaintiffs have standing to challenge Chapter 770. The Uniform Declaratory Judgments Act, Wis. Stat. § 806.04(2), provides "[a]ny person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." The following four conditions precedent must be met by a party bringing an action for a declaratory judgment: (1) the controversy must be one in which a claim of right is asserted against a party who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy – that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination. *Miller Brands-Milwaukee, Inc. v. Case, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991).* "If all four factors are satisfied, the controversy is 'justiciable,' and it is proper for a court to entertain an action for declaratory judgment." *Id.*

In the present case, the parties dispute whether the third condition precedent is met, meaning that the parties disagree as to whether Plaintiffs have a legally protectable interest in the controversy. Plaintiffs argue they have standing based on their status as taxpayers, alleging that "Chapter 770 requires the illegal and unconstitutional expenditure of public funds and extends

illegal and unconstitutional exemptions from taxes." (Compl. ¶ 10). In order to have standing as a taxpayer, tax money must be spent on the allegedly unconstitutional activity. *Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988). A taxpayer seeking "relief against claimed illegal expenditures of public monies has standing even if such expenditure would not increase taxes and even though the ultimate pecuniary loss to the individual would be almost infinitesimal." *Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, 91-92, 279 N.W.2d 479 (Ct. App. 1979). This is because "[a]ny illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss" due to the fact that it "results either in the governmental unit('s) having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure." *Thompson v. Kenosha County*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974) (quoting *S.D. Realty Co. v. Sewage Comm.*, 15 Wis. 2d 15, 22, 122 N.W.2d 177 (1961). "Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit." *Id.*

Plaintiffs make three specific claims as to why Chapter 770 requires the expenditure of public funds. First, Plaintiffs argue that public funds have been expended to create and implement the Registry required under Chapter 770. (Pls.' Reply Br. 3). Second, they argue that Chapter 770 requires the expenditure of public funds in that it creates several entitlements to be paid from General Purpose Revenues. (*Id.* at 4). Finally, Plaintiffs argue they have standing to bring the present claims because Chapter 770 exempts registered partners from paying certain fees collected by state and local governments, including the real estate transfer fee, the manufactured home title transfer fee, and the motor vehicle transfer fee. (*Id.*). As a result, Plaintiffs contend that they have standing because they sustain a "pecuniary loss – either because the State of Wisconsin has less money to spend for other governmental objectives, or because the

State of Wisconsin must levy additional taxes to make up for the loss resulting from the illegal and unconstitutional expenditures and exemptions created by Chapter 770." (Compl. ¶ 10).

In contrast, Defendants argue that Plaintiffs lack taxpayer standing because they cannot demonstrate an injury to a legally protectable interest. Defendants contend that the Registry is fully supported by the fees charged to those that register. *See* Wis. Stat. § 770.07.[5] (Gov. Def. Br. 4). They argue that the only benefit provided through Chapter 770 is the ability to register and that Chapter 770 does not contain any exemptions from taxes or fees. (*Id*. at 6). Moreover, Defendants contend that only program revenue funds, i.e., those fees collected by the government in connection with the Registry, were and are used to create, operate and administer the Domestic Partner Registry (*Id*., citing to Andrew Forsaith Aff. ¶¶ 8-10. December 17, 2010). As a result, Defendants argue that Chapter 770 has no fiscal effect and therefore Plaintiffs do not have taxpayer standing because they suffer no cognizable harm. (*Id*. at 6).

However, despite Defendants' contentions, Plaintiffs have standing to bring the present claims because Chapter 770 requires the expenditure of public revenue funds. In fact, Defendants admit that the State Office of Vital Records used program revenue funds[6] to create and implement the Registry, as well as to finance the Registry's ongoing operation and administration. (Forsaith Aff. ¶¶ 9, 10). Specifically, the Forsaith Affidavit indicates that only public funds collected by state and local governments for certain services (i.e., program revenue

[5] County clerks are required to collect a fee for each declaration of domestic partnership issued, and also for each certificate of termination of domestic partnership. Those fees are to be in the same amount as the clerk receives for issuing a marriage license. A portion of those fees is paid into the state treasury, and the remainder is county funds. Wis. Stat. § 770.17. County clerks are also allowed to charge up to an additional $10 to cover increased processing costs incurred by the county in connection with issuing a declaration of domestic partnership in fewer than five days after the application for declaration is made. Wis. Stat. § 770.07(1)(b)(2). The clerks are also required to collect standard notary fees connected with each declaration of domestic partnership a certificate of termination of domestic partnership issued. Such notary fees may be retained by a clerk if the clerk operates on a fee or part-fee basis, otherwise that fee becomes county funds. Wis. Stat. § 770.17. Moreover, the State Office of Vital Records charges a fee of $20 for any copies of vital records, including domestic partnership documents, and an additional fee for expedited service. (*Id*.; *see* Wis. Stat. §§ 69.21, 69.22). A portion of the monies received for copies of the domestic partnership documents registration is retained by the State Office of Vital Records as program revenue. (Forsaith Aff.¶ 6).

[6] Program revenue funds are those collected by state or local governments for services such as licensing, fees, certifications, and registrations. (Forsaith Aff. ¶ 8). Program revenue does not include taxes. (*Id*.).

funds collected by state or local governments for services such as licensing, fees, certifications, and registrations) were used to pay for the registry at the Wisconsin Department of Health Services. The Forsaith Affidavit does not make any claims that the monies expended pursuant to the Registry are those derived *only* from the Registry's program revenue. (Emphasis added.). Thus, the Registry requires the expenditure of public money, and if the Registry were held unconstitutional, this expenditure would also be illegal. This sufficiently establishes Plaintiffs' pecuniary loss. *See Thompson v. Kenosha County*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974). Therefore, Plaintiffs have standing to bring the present claims.

III. Plaintiffs' burden of proof

"All legislative acts are presumed constitutional and every presumption must be indulged to uphold the law if at all possible." *Norquist v. Zeuske*, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997). The presumption of statutory constitutionality is the product of the court's "recognition that the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature." *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 20, 237 Wis. 2d 99, 613 N.W.2d 849. Therefore, the party challenging the act must overcome a strong presumption of constitutionality and prove the act is unconstitutional beyond a reasonable doubt. *Norquist*, 211 Wis. 2d 241 at 250. Where doubt exists as to the legislative act's constitutionality, it must be resolved in favor of upholding the act. *Treiber v. Knoll*, 135 Wis. 2d, 64, 398 N.W.2d 756 (1987). "The duty of the court is only to determine if the legislation clearly and beyond doubt offends a provision of the state constitution that specifically circumscribes legislative action." *Aicher*, 2000 WI 98 at ¶ 20.

IV. The Marriage Amendment

The Wisconsin Supreme Court has stated the following with regard to interpreting the meaning of a constitutional amendment:

> The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. *State v. Cole,* 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328 (citations omitted). Constitutions should be construed so as to promote the objects for which they were framed and adopted. *Id.* "The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.]"

Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 28, 719 N.W.2d 408. Therefore, to determine the meaning of a constitutional provision, the court examines the following three primary sources: (1) the plain meaning; (2) the constitutional debates and practices of the time; and (3) the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption. *Id*.

A. (1) The Marriage Amendment's plain meaning

The first source the court examines in determining the meaning of a constitutional provision is the plain meaning. *Dairyland Greyhound Park*, 2006 WI 107 at ¶ 19. The plain language of the Marriage Amendment is as follows:

> 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.

Article XIII, Sec. 13, Wis. Const.

The Marriage Amendment can be broken down into two parts. The first part is contained in the first sentence and states the Marriage Amendment's purpose of preserving "the one man-one woman character of marriage by so limiting marriages entered into or recognized in Wisconsin." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 54, 326 Wis. 2d 1, 783 N.W.2d 855. The second part is contained in the second sentence, and accomplishes the Marriage Amendment's purpose by ensuring "that no legislature, court, or any other government entity can get around the first sentence by creating or recognizing 'a legal status identical or substantially similar to that of marriage.'" *Id*. Therefore, the key words and terms in the Marriage Amendment are "status," "substantially similar," and "marriage."

1. Legal "status"

The word "status" is defined as the "sum total of a person's legal rights, duties, [and] liabilities." *Black's Law Dictionary* 1447 (8th ed. 2004). As the Amendment is worded, the term "legal" is used to describe "status." Thus, the Marriage Amendment only prohibits a "legal status" that is identical or substantially similar to marriage for unmarried individuals; the Marriage Amendment does not prohibit a non-legal (*i.e.*, social) status that is identical or substantially similar to marriage for unmarried individuals.

2. "Substantially similar"

The term "substantially similar" has significance both as individual words and as a complete phrase. The word "substantially" is defined as "essentially." *Black's Law Dictionary* 1597 (Revised 4th ed. 1968). The word "similar" is defined as "alike though not identical." *The American Heritage College Dictionary* 1270 (3rd ed. 1997). Based on these definitions, the term "substantially similar" means essentially alike, though not identical.

However, it is important to note that a legal status must be more than just "similar" to marriage to be prohibited by the Marriage Amendment. This is because the word "substantially" modifies the word "similar." The result of this modification is that a status must be closer to identical to marriage, as opposed to merely alike marriage, before it will fall within the Marriage Amendment's prohibition.

Finally, the phrase "substantially similar" modifies the term "legal status." Thus, only a legal status that is substantially similar to marriage violates the Marriage Amendment; however, a legal status that is not substantially similar to marriage does not violate the Marriage Amendment.

3. "Marriage"

Lastly, whether a legal status for unmarried individuals violates the Marriage Amendment turns on the meaning of "marriage." In general, "[m]arriage, so far as its validity at

law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife." Wis. Stat. § 765.01. In recognition of the importance of marriage, the legislature started the Marriage and Family statutory chapter stating:

> It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned. Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

Wis. Stat. § 765.001(2).

However, marriage is not purely a private contract. Instead, "[t]here are three parties to a marriage contract – the husband, the wife, and the state. *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500 (1950). "The state has the right to control and regulate by reasonable laws the marriage relationship of its citizens and the wishes and desires or even immediate welfare of the individual must yield to that of the public welfare as determined by the public policy of the state." *Kitzman v. Kitzman*, 167 Wis. 308, 166 N.W. 789, 792 (1918). The state does so by establishing eligibility criteria for who is allowed to marry (Wis. Stat. §§ 765.02, 765.03), the process by which individuals get married (Wis. Stat. §§ 765.05, 765.09(3), 765.13, 765.11, 765.12), the requirements for solemnisation (Wis. Stat. §§ 765.16 through 765.19), the process by which a marriage can be terminated (Wis. Stat. §§ 737.335(1), 767.61, 767.385). The state

also controls marriage by conferring many rights, benefits, and responsibilities on the husband and wife solely because of their marriage status. Ultimately, "marriage is a social relation subject to the State's police power." *Loving v. Virginia*, 388 U.S. 1, 7, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967) (citing to *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888)).

Based on the foregoing considerations, there are two elements to marriage: first, there is the private bond between two people that the state recognizes by solemnifying the marriage; and second, there are the benefits, rights, and responsibilities the state confers on the husband and wife solely by virtue of their status of being married.

B. (2) The constitutional debates and practices of the time

Second, after the plain meaning analysis, the court considers the historical context of the amendment, which includes the constitutional debates and the practices in existence at the time of the writing of the constitution. *Dairyland Greyhound Park, Inc.,* 2006 WI 107 at ¶ 19. The Wisconsin Supreme Court has explained:

> As the purpose of construction of an amendment is to give effect to the intent of the framers and the people who adopted it, a paramount rule of constitutional construction is that the intent of the 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[.]" *Id.* at 730, 150 N.W.2d 447. "[W]hen the intent of the whole is ascertained, no part is to be construed so that the general purpose [is] thwarted, but the whole is to be made to conform to reason and good discretion." *Id.* (citation omitted).

Id. at ¶ 24. In examining the historical context of the provision, the court's review includes a look at "the practices and interpretations of other states." *State v. Cole*, 2003 WI 112, ¶ 39, 264 Wis. 2d 520, 665 N.W.2d. The court's historical examination also includes a consideration of the amendment's general history as well as the legislative debates and the ratification campaign. *Schilling v. State Crime Victims Rights Bd*., 2005 WI 17, ¶ 16, 278 Wis. 2d 216, 692 N.W.2d 623.

1. The practices and interpretations of other states

The Wisconsin Marriage Amendment was introduced and passed during a time when other states were discussing same-sex marriage. In 1993, the Hawaii Supreme Court held in *Baehr v. Lewin* that the denial of marriage licenses to same-sex couples under the state constitution was subject to strict scrutiny and remanded the cause for further proceedings on the issue as to whether strict scrutiny was satisfied. 74 Haw. 530, 852 P.2d 44 (1993). However, before the lower court's decision that the state failed to meet strict scrutiny could be reviewed on appeal (*see Baehr v. Miike* (Haw.Cir.Ct.1996) 1996 WL 694235), the voters ratified a state constitutional amendment that gave the Hawaii Legislature the right to reserve marriage to opposite-sex unions. Haw. Const. art. I, § 23 (passed by the Hawaii Legislature in 1997, ratified by voters on November 3, 1998).[7] The amendment protected the 1994 statutory enactment which added the requirement that a valid marriage contract could "be only between a man and a woman." Haw. Rev. Stat. Ann. § 572-1.

In September of 1996, Congress passed, and the President signed, the federal Defense of Marriage Act (hereinafter "DOMA"). Pub. L. 104-109, 110 Stat. 2419 (1996). The DOMA defines "marriage," for the purposes of various federal benefits and other programs, to mean "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. Furthermore, the DOMA defines "spouse" as "a person of the opposite sex who is a husband or a wife." *Id*. Finally, the DOMA provides that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

[7] Haw. Const. art. I, § 23 states that the "legislature shall have the power to reserve marriage to opposite-sex couples."

In 1999, the Vermont Supreme Court held in *Baker v. Vermont* that the exclusion of same-sex couples from the benefits and protections incident to marriage under state law violated the common benefits clause of Vermont's Constitution. 170 Vt. 194, 744 A.2d 864 (1999). The court did not require that same-sex couples be allowed to marry, but instead found that the legislature could adopt a statutory scheme that established "an alternative legal status to marriage for same-sex couples, impos[ing] similar formal requirements and limitations, creat[ing] a parallel licensing or registration scheme, and extend[ing] all or most of the same rights and obligations provided by the law to married partners." *Id*. at 886. In response, in 2000 the Vermont Legislature created the status of civil unions, which confers to the "[p]arties to a civil union… all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a civil marriage." Vt. Stat. Title 15, § 1204.

In November of 2003, the Massachusetts Supreme Judicial Court in *Goodridge, et al. v. Department of Public Health* held that it was unconstitutional to limit the protections, benefits and obligations of civil marriage to individuals of opposite sexes under the Massachusetts Constitution. 798 N.E.2d 941, 440 Mass. 309 (2003). As a result of the court's decision in *Goodridge*, municipal clerks began to issue marriage licenses to same-sex couples in Massachusetts in May of 2004. 1 Mass. Prac., Family Law and Practice § 18:16 (3d ed.).

2. The Wisconsin Marriage Amendment

In 2003, the Legislature passed, and the Governor vetoed, 2003 Assembly Bill 475 (hereinafter "2003 AB 475").[8] The veto was sustained on November 12, 2003.[9] Had 2003 AB 475 passed, it would have added the following sentence to the "intent" section in the Family Code, Wis. Stats. Chapters 765 through 768:

[8] 2003 AB 475, available online at http://legis.wisconsin.gov/2003/data/AB-475.pdf (last visited May 23, 2011).
[9] Roll Call on 2003 AB 475, available online at http://legis.wisconsin.gov/2003/data/votes/av0400.pdf (last visited May 23, 2011).

> It is the public policy of this state that marriage may be contracted only between one man and one woman.[10]

It also would have revised the existing language of Wis. Stat. § 765.01 to add the bolded language:

> Marriage, as far as its validity at law is concerned, is a civil contract **between one man and one woman**, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.[11]

Finally, it would have created two new subsections in the statutes. First, it would have added a new subsection to Wis. Stat. § 765.01, subsection (2), to read:

> Regardless of whether s. 765.04 applies and regardless of whether a marriage takes place in another jurisdiction in which marriage other than between one man and one woman is defined as valid, only marriage between one man and one woman shall be recognized as valid in this state.[12]

Second, it would have created Wis. Stat. § 990.01(19p) in the Construction of Statutes chapter to read:

> "Marriage" means a civil contract between one man and one woman that creates the legal status of the parties of husband and wife.[13]

On February 9, 2004, the Wisconsin Marriage Amendment was first introduced as 2003 Assembly Joint Resolution 66 (hereinafter "2003 AJR 66") and provided that "only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."[14] After a favorable report by Assembly Committee on the Judiciary by 6 to 1 vote, the bill went to the Assembly floor.[15] There, certain Assembly

[10] 2003 AB 475, available online at http://legis.wisconsin.gov/2003/data/AB-475.pdf (last visited May 23, 2011).
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/AJR-66.pdf (last visited May 23, 2011).
[15] History of 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/AJR66hst.html (last visited May 23, 2011).

democrats offered a substitute amendment that only contained the first sentence.[16] The Assembly rejected the substitute amendment, 61 to 36.[17] After rejecting an amendment by Rep. Pedro Colon (D-Milwaukee),[18] the Assembly adopted the Amendment, 68 to 27.[19]

The Marriage Amendment then went to the Senate where it was taken up after a favorable committee vote.[20] A series of 12 amendments were offered by Sen. Time Carpenter (D-Milwaukee), all of which were rejected on basically party line votes.[21] On March 11, 2004, the bill was passed, 20 to 13.[22]

Having passed both houses of the legislature during the 2003 session, the Amendment had to pass both again during the next session. Wis. Const. art. XII, § 1.[23] On November 23, 2005, the Amendment was again introduced to the Assembly as 2005 Assembly Joint Resolution 67 (hereinafter "2005 AJR 67")[24] and reported favorably with the Committee on the Judiciary.[25] On the floor, Assembly democrats again offered a substitute amendment that only contained the

[16] Assembly Amendment 1 to 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/AJR66-AA1.pdf (last visited May 23, 2011).
[17] Roll Call on Assembly Amendment 1 to 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/votes/av0555.pdf (last visited May 23, 2011).
[18] Rep. Colon introduced an amendment to change the language to read "one undivorced man and one undivorced woman." (Assembly Amendment 3 to 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/AJR66-AA3.pdf (last visited May 23, 2011)). The Assembly rejected the amendment, 59 to 38. (Roll Call on the decision of the chair regarding Assembly Amendment 3, available online at http://legis.wisconsin.gov/2003/data/votes/av0556.pdf (last visited May 23, 2011)).
[19] Roll Call on Adoption of 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/votes/av0569.pdf (last visited May 23, 2011).
[20] History of 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/AJR66hst.html (last visited May 23, 2011).
[21] *Id*.
[22] Roll Call on the Adoption of 2003 AJR 66, available online at http://legis.wisconsin.gov/2003/data/votes/sv0520.pdf (last visited May 23, 2011).
[23] In order to amend the Wisconsin Constitution, two successive legislatures must pass a proposed constitutional amendment before putting the measure to the voters for ratification. Wis. Const. art. XII, § 1.
[24] 2005 AJR 67, available online at http://legis.wisconsin.gov/2005/data/AJR-67.pdf (last visited May 23, 2011).
[25] History of 2005 AJR 57, available online at http://legis.wisconsin.gov/2005/data/AJR67hst.html (last visited May 23, 2011).

first sentence.[26] The legislative leadership then tabled the underlying resolution and the bill failed to pass in the regular session.[27]

However, on November 22, 2005, it was introduced in the Senate as 2005 Senate Joint Resolution 53 (hereinafter "2005 SJR 53") and eventually passed out of committee.[28] Democrats again proposed a substitute amendment containing only the first sentence, which was rejected.[29] After rejecting several other substitutes, all offered by Senator Carpenter, the Senate favorably reported the underlying legislation, 19 to 14.[30]

The Assembly leadership sent the bill straight to the Rules Committee, which scheduled it promptly for floor action in a special session.[31] The Assembly again rejected a first sentence only substitute, 57 to 38.[32] On February 28, 2006, the Assembly passed the underlying bill, 62 to 31.[33]

3. The legislative debates

A review of the drafting files indicates that that the legislative proponents of the Marriage Amendment repeatedly told their colleagues and voters three messages: first, that the second sentence of the Amendment is only designed to prohibit something like a "Vermont-style" civil union that provides all of the rights and benefits of marriage; second, that the Amendment does not prohibit the state from creating a legal construct to provide benefits to same-sex couples; and

---

[26] Assembly Substitute Amendment 1 to 2005 AJR 67, available online at http://legis.wisconsin.gov/2005/data/AJR67-ASA1.pdf (last visited May 23, 2011).
[27] History of 2005 AJR 67, available online at http://legis.wisconsin.gov/2005/data/AJR67hst.html (last visited May 23, 2011).
[28] 2005 SJR 53, available online at http://legis.wisconsin.gov/2005/data/SJR-53.pdf (last visited May 23, 2011).
[29] Senate Substitute Amendment 1 to 2005 SJR 53, available online at http://legis.wisconsin.gov/2005/data/SJR53-SSA1.pdf (last visited May 23, 2011).
[30] Roll Call on Senate Substitute Amendment 1 to 2005 SJR 53, available online at http://legis.wisconsin.gov/2005/data/votes/sv0311.pdf (last visited May 23, 2011).
[31] History of 2005 SJR 53, available online at http://legis.wisconsin.gov/2005/data/SJR53hst.html (last visited May 23, 2011).
[32] Roll Call on Assembly Substitute Amendment 2 to 2005 SJR 53, available online at http://legis.wisconsin.gov/2005/data/votes/av0492.pdf (last visited May 23, 2011).
[33] Roll Call on Adoption of 2005 SRJ 53, available online at http://legis.wisconsin.gov/2005/data/votes/av0493.pdf (last visited May 23, 2011).

third, that the Amendment does not prevent the legislature from packaging together a large bundle of rights for same-sex couples.

In his memo introducing the Marriage Amendment to his colleagues on first consideration and soliciting co-sponsors, Representative Mark Gundrum, one of the Legislative authors and lead sponsors of the Amendment, warned that the Marriage Amendment was needed because nothing in Wisconsin's Constitution prohibited same-sex marriage or Vermont-style civil unions:

> [n]othing in our state constitution presently *protects against our State Supreme Court from doing the same thing the Massachusetts Supreme Court did in 2003* (or Vermont Supreme Court did in 1999 or the Hawaii Supreme Court did in 1993…) and legislating from the bench to radically alter marriage in this state and judicially impose same-sex marriage on this state.[34]

(Emphasis added.). Representative Gundrum also explained that the Marriage Amendment would not prohibit the state from creating a legal construct to provide benefits to same-sex couples:

> [The proposal] does <u>not</u> 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.[35]

(Emphasis in original.).

For further details and clarification regarding the Marriage Amendment, Representative Gundrum's memo referred legislators to the "non-partisan Wisconsin Legislative Council Memo dated January 28, 2004[36], from Don Dyke, Chief of Legal Services."[37] Attorney Dyke's memo

---

[34] Lester A. Pines Aff. Ex. 8, December 22, 2010, Rep. Mark D. Gundrum Memorandum *Re: Co-Sponsorship of LRB 4072/2, Constitutional amendment affirming marriage*, obtained from the drafting files for the Marriage Amendment.

[35] *Id*.

[36] The memo referred to is dated January 29, 2004; therefore, the incorrect date listed in Representative Gundrum's memo is presumably a typographical error.

[37] *Id*.

was written in response to Representative Gundrum's request for a "memorandum discussing how the [Marriage Amendment] might be interpreted if made part of the Wisconsin Constitution."[38] For purposes of his memo, Attorney Dyke assumed that the "reference to 'legal status of marriage' in the proposed language refers to **all** the legal rights, benefits, and obligations conferred and imposed by marriage."[39] (Emphasis in original.). In explaining that the Marriage Amendment's reference to a legal status "substantially similar to that of marriage" is open to interpretation, Attorney Dyke stated that:

> [i]t may be reasonable to speculate that in interpreting the language, a court might determine the purpose of the provision is to prevent this state from sanctioning what is effectively a civil marriage between unmarried individuals where the arrangement is designated by some other name. *Under this interpretation, a court might look to whether substantially all of the legal aspects of marriage are conferred, i.e., whether the legal status conferred is essentially intended to be the functional equivalent of marriage or something less than marriage that is not "substantially similar" to marriage*.[40]

(Emphasis added.).

Senator Fitzgerald, also a Legislative author and lead sponsor of the Amendment, and Representative Gundrum reiterated the messages about the Marriage Amendment in a Joint Media Release announcing the introduction of the proposal in the legislature. The Joint Media Release referenced Massachusetts and explained that "[t]he proposed amendment, while preserving marriage as one man-one woman unions, would also preclude the creation of unions which are substantially similar to marriage."[41] Moreover, the Joint Media Release clarified what the Marriage Amendment would not do:

---

[38] Pines Aff. Ex. 10, Wisconsin Legislative Council Chief of Legal Services Don Dyke memorandum to Representative Mark Gundrum *Re: Assembly Joint Resolution (LRB-407/2), Relating to Providing That Only a Marriage Between One Man and One Woman Shall be Valid or Recognized as a Marriage in This State*, dated January 29, 2004, obtained from the drafting files for the Marriage Amendment.

[39] *Id*. at 2.

[40] *Id*.

[41] Pines Aff. Ex. 9, Joint Media Release from Rep. Mark Gundrum and Sen. Scott Fitzgerald, *Constitutional Amendment to Protect Marriage Proposed*, dated January 28, 2004, obtained from the drafting files for the Marriage Amendment.

> [s]ignificantly though, the language does not prohibit the legislature, local governments or private business from extending particular benefits to same sex partners as those legal entitles might choose to do.[42]

On November 16, 2005, Senator Fitzgerald and Representative Gundrum sought co-sponsors for the proposed Marriage Amendment on second consideration by a memo addressed to "All Legislators."[43] The memo stated what the proposal "**DOES NOT DO**" (emphasis in original):

> [t]his 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 to 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.[44]

Shortly after introduction of the proposal for second consideration, Legislative Council Chief Attorney Dyke provided a second legal memorandum to Representative Gundrum at the Representative's request, addressing concerns about the reach of the second sentence of the proposal. Specifically, the memo's purpose was to help Representative Gundrum "better understand how a court might interpret the second sentence of the amendment."[45] In discussing the legislative intent behind the second sentence, Attorney Dyke stated that:

> [w]hile the first sentence of the proposed amendment would appear to address a legislative concern over marriages between persons of the same sex, it is quite conceivable that *the intent of the Legislature in drafting the 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 hypothesis is found in a memorandum circulated by [Representative Gundrum] as the amendment's primary author, seeking co-sponsors of the proposed amendment on first consideration.[46]

---

[42] *Id*.
[43] Pines Aff. Ex. 11, Memorandum from Rep. Mark Gundrum and Sen. Scott Fitzgerald addressed to "All Legislators" *Re: Cosponsorship of 3729/1, constitutional amendment affirming marriage,* dated November 16, 2005, obtained from the drafting files for the Marriage Amendment.
[44] *Id*.
[45] Pines Aff. Ex. 14, Wisconsin Legislative Council Chief of Legal Services Don Dyke Memorandum to Representative Mark Gundrum *Re: 2005 Assembly Joint Resolution 67 (Marriage Amendment)*, dated February 24, 2006, obtained from the drafting files for the Marriage Amendment.
[46] *Id*. at 5.

(Emphasis added.). Attorney Dyke concluded that it appears "that [Representative Gundrum] intended the amendment to prohibit same-sex marriages and legal arrangements like civil unions and civil compacts that essentially confer a legal status identical or substantially similar to that of marriage."[47] Moreover, after reviewing earlier statements of intent by various legislative authors, Attorney Dyke also concluded that:

> [w]hile perhaps not dispositive on its own, the above contemporary expressions of intent, combined with the historical context and plain language of the proposed amendment, lend strong support to the conclusion that the *intent of the Legislature with respect to the second sentence of the proposed 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 or nearly the same as marriage in Wisconsin*.[48]

(Emphasis added.).

Based on a review of the drafting files, it is clear that legislative proponents intended that the Marriage Amendment's second sentence prohibit the recognition of a Vermont-style civil union or a similar government-conferred legal status for unmarried individuals that is identical or virtually identical to marriage. However, the drafting files also show that legislative proponents did not intend for the Marriage Amendment to prevent the state from creating a legal construct to provide benefits to same-sex couples, or for it to prevent the legislature from packaging together a bundle of rights for same-sex couples. Therefore, according to the legislature's intent, a legal status created by the state or legislature that provides benefits to same-sex couples does not violate the Marriage Amendment as long as the legal status is not a Vermont-style civil union or similar legal status that is identical or virtually identical to marriage.

4. The ratification campaign

The "court presumes that, when informed, the citizens of Wisconsin are familiar with the elements of the constitution and with the laws, and that the information used to educate the

[47] *Id*.
[48] *Id*. at 9.

voters during the ratification campaign provides evidence of the voters' intent." *Dairyland Greyhound Park, Inc.*, 2006 WI 107 at ¶ 37 (citing *State ex rel. Ekern v. Zimmerman,* 187 Wis. 180, 192–94, 204 N.W. 803 (1925)). "[W]here such intention appears, the construction and interpretation of the acts must follow accordingly." *Id.* To discern the voters' intent, the court uses a number of sources, primarily newspaper stories, columns, and editorials. *Id*. at ¶¶ 39-42, 61 n. 38.

The messages presented to voters during the ratification campaign were similar to the messages contained in the Marriage Amendment's drafting files. The vast majority of informational materials available during the ratification campaign reveal that voters were repeatedly told that the purpose of the Marriage Amendment was to prohibit same-sex marriage and Vermont-style civil unions. Such materials also informed voters that the Marriage Amendment would not prohibit the state from creating a legal construct to provide benefits to same-sex couples, nor would it prevent the legislature from packaging together a bundle of rights for same-sex couples. Furthermore, the materials assured voters that the Marriage Amendment would not impact any existing domestic partnership arrangements that provided benefits to same-sex domestic partners.

In a press release published five days before the public was to vote on the Marriage Amendment, Senator Fitzgerald informed voters that the Amendment would not prohibit the legislature from establishing a legal construct to provide benefits to same-sex couples:

> The non-partisan Legislative Council has written that the *proposed amendment does not ban civil unions, only a Vermont-style system* that is simply marriage by another name. If the amendment is approved by the voters, which I expect it will be, *the legislature will still be free to pass legislation creating civil unions if it so desires*.[49]

(Emphasis added.).

[49] Pines Aff. Ex. 18, Press Release from Senator Fitzgerald downloaded from wispolitics.com, *Statement Re: One Wisconsin Now and the Defense of Marriage Amendment,* dated November 2, 2006.

Representative Scott Suder, the co-author of the Amendment, also published a press release that informed voters that although the Marriage Amendment would prohibit same-sex marriage and Vermont-style civil unions, it would not prevent the State from extending rights to same-sex couples:

> Suder, a co-author of the original amendment… said the Defense of Marriage Amendment is necessary in the wake of what he calls "activist" court rulings which legalized same sex marriage in Massachusetts and other states… "Marriage should be defined by law as being between one man and one woman, period," Suder stated. "We simply can't afford to allow activist judges to authorize same sex marriages here in Wisconsin like they did in Massachusetts and Vermont recently."
>
> Currently state law defines marriage as the institution whereby men and women are joined in a special kind of social and legal dependence from the purpose of founding and maintaining a family… *Suder said the proposal does NOT prohibit the state, local governments, or provide businesses from extending health insurance benefits and other privileges to same sex couples*.[50]

(Emphasis added.).

News articles reported to voters that the purpose of the Marriage Amendment was to prohibit same-sex marriage and Vermont-style civil unions, but that it would not threaten domestic partner benefits. For example, the Wisconsin State Journal informed voters that the Marriage Amendment "would declare that marriage is between one man and one woman and that unmarried individuals cannot be granted a legal status similar to marriage such as civil unions pioneered by Vermont."[51] Additionally, the newspaper informed voters that the Marriage Amendment would not threaten domestic partner benefits:

> "It's just inflammatory rhetoric," said Julaine Appling, present of Vote Yes For Marriage. "This amendment isn't going to change benefit structures that exist… It's about whether we are going to live with a redefinition of marriage as something other than between a man and a woman."[52]

---

[50] Pines Aff. Ex. 17, Media Release from Representative Scott Suder, *Rep. Suder Votes to Sent Defense of marriage Amendment to State Voters*, dated March 1, 2006, obtained form the drafting files for the Marriage Amendment.
[51] Pines Aff. Ex. 24, Wisconsin State Journal article dated August 1, 2006, *Labor unions to fight gay marriage amendment,* authored by Ryan J. Foley.
[52] *Id*.

The Badger Herald reported that Representative Gundrum explained that the Marriage Amendment "will prevent [courts] from doing what the [state] Supreme Court in Vermont did which is legalize same-sex marriage from the bench [and] allowing for it to be called a civil union or civil covenant or whatever creative term that the Legislature in that case might come up with."[53] The newspaper further quoted Representative Gundrum as stating that the Marriage Amendment would not threaten any domestic partner benefits:

> "To date, there has been no court in the entire country that has ruled that any of these amendments [banning same-sex marriage in other states] were intended or do prevent domestic partner benefits," Gundrum said. "It is a red herring that's out there."[54]

The Milwaukee Journal Sentinel reported that one area of contention regarding the Marriage Amendment was whether it would allow for civil unions.[55] The paper quoted Representative Gundrum informing voters that the Marriage Amendment would not prohibit the Legislature from giving benefits to same-sex couples because the Amendment was only intended to prevent Vermont-style civil unions:

> *[Rep. Mark] Gundrum said the amendment would allow the Legislature at some point to create a civil union that includes a limited number of benefits, as long as it wasn't "substantially similar" to what's granted to a married couple*.
>
> …
>
> "The second sentence does and was designed to prevent activist judges from doing what they did in Vermont – dictating that there be… marriage under a different name," Gundrum said. "That's all it's intended to do."[56]

(Emphasis added.).

Representative Gundrum wrote a letter to the Editor of the Milwaukee Journal-Sentinel

---

[53] Pines Aff. Ex. 15, Badger Herald article dated March 1, 2006, *Wisconsin Residents to Decide on Gay marriage Ban,* authored by Ann Babe.
[54] *Id*.
[55] Pines Aff. Ex. 16, Milwaukee Journal Sentinel article dated July 30, 2006, *Same-Sex Ban, Different Interpretations*, authored by Stacy Forster.
[56] *Id*.

regarding the Marriage Amendment.[57] In his letter he assured voters that the Marriage Amendment would not prohibit domestic partner benefits but would ban same-sex marriage and Vermont-style civil unions:

> As an attorney and chairman of the Assembly Judiciary Committee, I can confidently say that not one privilege or benefit that now exists for heterosexual or homosexual couples will be prohibited by this amendment.
>
> …
>
> The amendment will, however, prevent a majority of four activist justices on our state Supreme Court from doing what the Massachusetts Supreme Court did in legalizing same-sex marriage from the bench in 2003 and what the Vermont Supreme Court did in 1999 in legalizing same-sex marriage but permitting lawmakers to call it a "civil union."[58]

On October 27, 2006, Milwaukee Public Television Program No. 507 aired and addressed the topic of whether the Marriage Amendment would make us a better society.[59] Professor Rick Esenberg, an attorney and adjunct professor of law at Marquette Law School, explained that the purpose of the Marriage Amendment's second sentence was to prevent same-sex marriage and Vermont-style civil unions.[60] He stated that:

> [t]he second sentence will not interfere with legal accommodations of legitimate interests. Think of marriage as a bundle of sticks. Each stick is a different right or incident of marriage. The second sentence only prohibits creation of a legal status which would convey virtually all of those sticks.[61]

Kevin Voss, director of Concordia Bioethics Institute and instructor of philosophy, stated that:

> … law makers are on record of saying that they seek only to bar gay marriage under another name, not benefits, and since Wisconsin law says that courts must be guided by law makers' intentions and plain language, this is as close as you can get to a certainty… [T]he protection amendment is about preserving a one man, one woman marriage. It's not about benefits.[62]

---

[57] Pines Aff. Ex. 28, Milwaukee Journal-Sentinel letter to the Editor dated August 6, 2006, *Opponents Resort to Deception, Fear,* authored by Rep. Mark Gundrum.
[58] *Id*.
[59] Pines Aff. Ex. 3, A certified transcript of the statements made by the participants on Milwaukee Public Television Program No. 507, *Will The "Marriage Protection Amendment" Make Us a Better Society?* aired on October 27, 2006.
[60] *Id*. at 16:9-14; 40:13-14.
[61] *Id*. at 40-41:20-3.
[62] *Id*. at 14:2-12.

During the ratification campaign, the Family Research Institute of Wisconsin[63] created a publication that informed voters that the Marriage Amendment was inspired by the Massachusetts Supreme Court's holding in *Goodridge*, as well as the November 7, 2003, veto of the Wisconsin Legislature's attempt to clarify through 203 Assembly Bill 475 that marriage in Wisconsin was reserved to one man and one woman.[64] The publication stated that:

> The second part of Wisconsin's Marriage Protection Amendment is absolutely necessary in order to protect traditional marriage in Wisconsin. The two parts are a package deal: the first sentence clearly defines the word marriage and the second protects the institution itself from being undermined by "look-alike" marriages or marriages by another name… If such relationships are "identical or substantially similar to" marriage as it is defined and proscribed in this state, then they would not be given legal recognition. Vermont-style civil unions, for instance, would not be valid here since Vermont's civil unions are exactly analogous to marriage… *The second sentence doesn't even prevent the state legislature from taking up a bill that gives a limited number of benefits to people in sexual relationships outside of marriage, should the legislature want to do so.* While The Family Research Institute of Wisconsin thinks this would be very ill advised, the marriage Protection Amendment does nothing to prevent such consideration.[65]

(Emphasis added.).

The Wisconsin Coalition for Traditional Marriage[66] published an informational brochure titled "The 4 most commonly asked questions about changing the definition of traditional marriage."[67] The brochure advised the public that the Marriage Amendment was needed because:

> On May 17, 2004, Massachusetts became the first state in the history of the United States of America to redefine traditional marriage legalizing so-called homosexual "marriage."[68]

---

[63] As previously explained, the Family Research Institute of Wisconsin (n/k/a "Wisconsin Family Council") is a Wisconsin not-for-profit organization engaged in public education regarding family and social issues. (Appling Aff. ¶ 3).
[64] Pines Aff. Ex. 6, A publication from the Family Research Institute of Wisconsin entitled *Questions & Anders About Wisconsin's Marriage Protection Law,* dated August 2006.
[65] *Id*.
[66] A previously explained, the Wisconsin Coalition for Traditional marriage is a Wisconsin not-for-profit organization engaged in public education regarding family and marriage issues. (Appling Aff. ¶ 5).
[67] Julaine K. Appling Aff. Ex. D, March 8, 2011.
[68] *Id*.

The brochure stated that the purpose of the Marriage Amendment's second sentence:

> … is to protect the people of Wisconsin from having a court impose "look-alike" or "Vermont-style" homosexual "marriage," which Vermont legalized as "civil unions." These civil unions are simply marriage by another name. They are legally exact replica of marriage, but without the title. This portion of Wisconsin's Marriage Protection Amendment protects citizens from having a court or elected officials impose, against their will, this type of arrangement here, regardless of the name given to it.[69]

Vote Yes For Marriage[70] circulated a flyer that warned voters that Wisconsin was "one lawsuit and one judicial vote away from becoming a Massachusetts, where same-sex marriage is legal."[71] The flyer also clarified that the Marriage Amendment "is not about benefits."[72] Vote Yes For Marriage also ran three radio spots informing voters that they should vote yes on the Marriage Amendment to ban gay marriage.[73] The radio spots told voters that "if you vote no, activist judges could legalize gay marriage like they did in Massachusetts."[74]

Based on a review of the public statements made to voters during the ratification campaign, it is clear that voters understood that the Marriage Amendment's second sentence prohibits the recognition of Vermont-style civil unions and similar government-conferred legal statuses for unmarried individuals that are identical or virtually identical to marriage. However, because they were consistently told that the provision would not impact benefits, voters understood that the Marriage Amendment does not prevent the state or legislature from creating a legal status to give some rights to same-sex couples. Voters also understood that the only legal status prohibited by the Marriage Amendment is a Vermont-style civil union or similar legal status that is identical or virtually identical to marriage.

C. (3) The earliest interpretations of the provision by the legislature

[69] *Id*.
[70] As previously explained, Vote Yes For Marriage is a referendum campaign advocating for ratification of the Amendment. (Appling Aff. ¶ 4).
[71] Appling Aff. Ex. N.
[72] *Id*.
[73] Appling Aff. Ex. R, S, T, Vote Yes For Marriage radio ads.
[74] Appling Aff. Ex. R, T, Vote Yes For Marriage radio ads.

The final source the court examines in determining the meaning of a constitutional provision is the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption. *Dairyland Greyhound Park, Inc.*, 2006 WI 107 at ¶ 19. The legislature's subsequent actions are "a crucial component of any constitutional analysis because they are clear evidence of the legislature's understanding of that amendment." *Id*. at ¶ 45.

The biennial budget bill, 2009 Assembly Bill 75, which contained the provisions that created Chapter 770 domestic partnerships and accorded certain rights to domestic partners through amendment of other sections of the statutes, was the first action by the Wisconsin Legislature subsequent to the adoption of the Marriage Amendment that was related to a legal status for non-marital (can particularly same-sex) couples. Therefore, an examination of Chapter 770 is a crucial component in determining the meaning of the Marriage Amendment because it is clear evidence of the legislature's understanding of the Marriage Amendment.

Chapter 770 starts with a "Declaration of Policy" which states:

> The legislature finds that it is in the interests of the citizens of this state to establish and provide the parameters for a legal status of domestic partnership. The legislature further finds that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage. Nothing in this chapter shall be construed as inconsistent with or a violation of article XIII, section 13, of the Wisconsin Constitution.

Wis. Stat. § 770.001. Thus, according to the policy declaration, the Legislature carefully considered the constitutionality of Chapter 770 in light of the Marriage Amendment prior to enacting the domestic partner registry.

For example, prior to enacting the bill the Legislative Fiscal Bureau ("LFB") noted that including domestic partner rights in the bill "raised some concerns that the provisions may create

a status for domestic partnerships substantially similar to marriage."[75] As a result of its concerns, the LFB requested for the legal opinion of Wisconsin Legislative Council's Chief of Legal Services as to whether Chapter 770 violated the Marriage Amendment. Based upon the framework described in the *Dairyland* case, the Chief of Legal Services determined that the legal status of domestic partnership does not include the "core aspects of the legal status of marriage such as the mutual obligation of support that spouses have in a marriage under Wis. Stat. §§ 765.001(2) and 766.55(2)(a); the comprehensive property system that applies to spouses under the marital property law contained in Chapter 766; and the requirements of divorce law contained in Chapter 767, including the procedures for termination of marriage, division of property, support requirements, and a sex-month prohibition against remarriage."[76] As a result, the Chief of Legal Services concluded:

> 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 [the Marriage Amendment]; on evidence of legislative intent concerning [the Marriage Amendment] 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 [the Marriage Amendment].[77]

Before signing the bill creating Chapter 770, Governor Jim Doyle requested that Professor David Schwartz from the University of Wisconsin Law School faculty provide a legal opinion to him specifically addressing whether the domestic partnership provisions were

[75] Pines Aff. Ex. 29, Legislative Fiscal Bureau (hereinafter "LRB") Paper #391 to the Joint Committee on Finance, *Establishment of Domestic Partnership and Related Rights and Benefits (General Provisions)*, at 6 (May 19, 2009).
[76] Pines Aff. Ex. 30, Wisconsin Legislative Council Chief of Legal Services Don Dyke Memorandum to Bob Lang, Director, Legislative Fiscal Bureau, *Domestic Partnership in 2009 Assembly Bill 75 (Biennial Budge Bill) and Article XIII, Section 13, Wisconsin Constitution*, dated May 6, 2009.
[77] *Id*.

compatible with the Marriage Amendment's second sentence.[78] Professor Schwartz summarized his opinion as follows:

> Construed in accordance with the intent of the voters who adopted it, the intent of the legislature which drafted it, and the applicable principles of constitutional interpretation, Art. XIII, § 13 is intended to ban same-sex marriages and civil unions that exactly replicate the rights and obligations of marriage, but not civil unions or domestic partnerships that bear any significant difference from marriage.
>
> …
>
> This "any significant difference" test is met by [the domestic partnership provisions in 2009 Act 75]… There are numerous… significant differences between marriage and the proposed Wisconsin domestic partnerships.[79]

Based on an examination of Chapter 770, it is clear that the legislature understood that the Domestic Partner Registry does not violate the Marriage Amendment. Specifically, the legislature understood that the domestic partnership status created by Chapter 770 is not "identical or substantially similar to that of marriage."

D. The meaning of the Marriage Amendment

Three conclusions can be drawn regarding the meaning of the Marriage Amendment based on the foregoing analysis of the plain language, the constitutional debates and practices of the time, and the earliest interpretations by the legislature. First, the Marriage Amendment's plain meaning establishes that a legal status for unmarried individuals is unconstitutional if the sum total of the legal rights, duties, and liabilities of the legal status is identical or so essentially alike that it is virtually identical to the legal rights, duties, and liabilities of the legal status of marriage. However, because there are two elements of marriage, a legal status for unmarried individuals is unconstitutional only if: (1) it is recognized by the state in a substantially similar

[78] Pines Aff. Ex. 32, Legal Opinion from University of Wisconsin Professor David S. Schwartz to Governor Jim Doyle, *Constitutionality of Domestic Partner Benefit Provisions in the Governor's 2009-11 Executive Budget, AB 75*, dated June 4, 2009.
[79] *Id*. at 1-2.

way as marriage; and (2) if the state confers substantially similar benefits, rights, and responsibilities on the unmarried individuals solely by virtue of the status like the state does on spouses. Second, the Marriage Amendment's second sentence prohibits the recognition of Vermont-style civil unions or a similar government-conferred legal status for unmarried individuals that is identical or virtually identical to marriage. Finally, the Marriage Amendment does not prevent the state from creating a legal construct to provide benefits to same-sex couples, nor does it prevent the legislature from packaging together a bundle of rights for same-sex couples.

V. Chapter 770 – The Domestic Partner Registry

With the foregoing analysis in mind, it is clear that Chapter 770 does not violate the Marriage Amendment because it does not create a legal status for domestic partners that is identical or substantially similar to that of marriage. Specifically, the sum total of domestic partners' legal rights, duties, and liabilities is not identical or so essentially alike that it is virtually identical to the sum total of spouses' legal rights, duties, and liabilities. The state does not recognize domestic partnership in a way that mirrors how the state recognizes marriage. Moreover, the state confers drastically different benefits, rights, and responsibilities to domestic partners solely by virtue of their domestic partnership status in comparison to the benefits, rights, and responsibilities given to spouses because of their marriage status. In addition, Chapter 770 is nothing remotely similar to a Vermont-style civil union, which extends virtually all the benefits spouses receive to domestic partners. Instead, Chapter 770 is simply a legal construct created to provide benefits to same-sex couples. As a result, Chapter 770 does not violate the Marriage Amendment is therefore constitutional.

A. State recognition of domestic partners and spouses

The state does not recognize domestic partnership in a way that mirrors the recognition of marriage because there are drastically different requirements for each status' eligibility criteria, process of formation, and process of termination.

1. The eligibility criteria

Pursuant to Wis. Stat. § 770.05, two individuals may form a domestic partnership if they meet the following criteria:

(1) Each individual is at least 18 years old and capable of consenting to the domestic partnership;

(2) Neither individual is married to, or in a domestic partnership with, another individual;

(3) The 2 individuals share a common residence[80];

(4) The 2 individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and

(5) The individuals are members of the same sex.

Pursuant to Wis. Stat. §§ 765.002(2), 765.02, 765.03, and the Marriage Amendment, two individuals may form a marriage if they meet the following criteria:

(1) They have both attained the age of 18 years and are otherwise competent, or are between the ages of 16 and 18 with the consent of a parent or guardian (Wis. Stat. § 765.02);

(2) Neither individual is married to another person (Wis. Stat. § 765.03(1));

(3) They are not nearer of kin than second cousins by blood unless the female is over 55 years of age or one of the individuals is permanently sterile (Wis. Stat. § 765.03(1));

(4) Neither individual has been divorced for less than six months (Wis. Stat. § 765.03(2)); and

(5) One of the individuals must be a man and the other a woman (Wis. Stat. § 765.001(2) and the Marriage Amendment).

[80] Under Wis. Stat. § 770.05(3), two individuals may share a common residence even if any of the following applies: (a) only one of the individuals has legal ownership of the residence; (b) one or both of the individuals have one or more additional residences not shared with the other individual; or (c) one of the individuals leaves the common residence with the intent to return.

There are three ways the criteria for forming a domestic partnership and the criteria for forming a marriage are similar. First, the criteria for both require the parties to be at least 18 years of age and competent. (Compare Wis. Stat. § 770.05(1) with § 765.02). Second, both criteria require the parties to be of a certain sex. (Compare Wis. Stat. § 770.05(5) with § 765.001(2)). Third, the criteria for forming both legal relationships require that the parties not be closely related by blood. (Compare Wis. Stat. § 770.05(4) with § 765.03(1)).

However, despite the fact that there are some similarities in who can form each status, there are far greater differences between the eligibility criteria for a domestic partnership compared to the eligibility criteria for marriage. First, no minor may become a domestic partner, even with the consent of a parent or guardian, whereas minors between the ages of 16 and 18 can marry with parental consent. (Compare Wis. Stat. § 770.05(1) with § 765.02). Second, while the criteria for both require the parties to be of a certain sex, the legal relationships differ in that domestic partners must always be of the same sex, whereas the parties to a marriage must always be one man and one woman. (Compare Wis. Stat. § 770.05(5) with § 765.001(2) and the Marriage Amendment). Third, no individuals who are nearer kin than second cousins may ever be domestic partners whether their relationship is by blood or by adoption. Wis. Stat. § 770.05(4). In contrast, first cousins by adoption may marry, as may first cousins where the female is over 55 years of age, or if at least one party is sterile. Wis. Stat. § 765.03(1). Fourth, an individual who has been divorced less than six months may become a domestic partner but may not marry. Wis. Stat. § 765.03(2). In contrast, there is no comparable limitation for an individual whose domestic partnership has been terminated for less than six months. Finally, domestic partners are required to share a common residence whereas there is no similar requirement that spouses share a household. Wis. Stat. § 770.05(3). Ultimately, the vast

differences in eligibility criteria for each status prove that the state does not recognize domestic partnerships in a way that mirrors recognition of marriage.

Plaintiffs attempt to dismiss the differences in the eligibility criteria for each status by arguing that the differences are not "substantial." (Pls.' Supp. Br. 7). They attribute the difference in age requirements to the fact that heterosexual couples under 16 can have children, creating the possibility they (with parental consent) may need to marry. (*Id*. at 6). They further argue that women "over 55 generally cannot bear children and permanently sterile couples (by definition) cannot procreate, making relationships between relatives of a closer degree of consanguinity less problematic." (*Id*. at 7). Furthermore, while Plaintiffs admit that there "is no *per se* requirement for married couples to certify the sharing of a residence upon entry into the institution, the sharing of a household is a quintessential feature of marriage." (*Id*. at 8).

Plaintiffs' explanation for the differences in eligibility criteria is unpersuasive. Plaintiffs do not appear to recognize the significance of a *legal requirement*. (Emphasis added.). Because the Marriage Amendment prohibits a legal status that is identical or substantially similar to the sum total of the legal rights, duties, and liabilities of married individuals, the court is only concerned with the legal rights, duties, and liabilities of both statuses. Domestic partners are *legally required* to share a common residence in order to form a domestic partnership. (Emphasis added.). In contrast, spouses are not *legally required* to share a residence in order to form a marriage. (Emphasis added.). Using the "quintessential features" of each legal status as a foundation for comparing domestic partnerships to marriage unquestionably places this court on the wrong track for its analysis.

2. The process of formation

Forming a domestic partnership is a one-step process that requires completing the required paperwork. Specifically:

(1) One of the parties must live in the county in which they file an application for a declaration for 30 days. Wis. Stat. § 770.07(1)(a).

(2) Both parties must submit a sworn application for a declaration of domestic partnership containing their social security numbers to the county clerk, presenting proof of identification and residence certified copies of their birth certificates, and, if applicable, also provide copies of any judgments, certificates of termination of domestic partnership, or death certificates affecting the domestic partnership status. Wis. Stat. §§ 770.07(1)(c), 770.07(1)(d).

(3) The couple must pay a fee of $49.50 for the domestic partnership declaration. Wis. Stat. § 770.17.

(4) No domestic partnership declaration may be issued within 5 days of application for the domestic partnership declaration; however, the county clerk may, at his or her discretion, issue a declaration of domestic partnership less than 5 days after application if the applicant pays an additional fee of not more than $10 to cover any increased processing cost incurred by the county. Wis. Stat. § 770.01(1)(b).

Once these requirements have been complied with, the county clerk shall issue a declaration of domestic partnership, which must then be signed before a notary who acknowledges the signatures, and submitted to the register of deeds. Wis. Stat. § 770.10.

In contrast, forming a marriage is a two-step process: first, an opposite-sex couple must complete the paperwork required to obtain a marriage license; and second, they must have a marriage ceremony. The following is what is required to complete the marriage license paperwork:

(1) One of the parties must live for 30 days in the county from which a marriage license is to be obtained, or, if neither party is a resident of the state, the license may be obtained from the county where the marriage ceremony is to be performed. Wis. Stat. § 765.05.

(2) Both parties must submit a sworn application for marriage license containing their social security numbers to the county clerk, presenting proof of identification and residence, certified birth certificates and if applicable, death certificates or judgments affecting marital status. Wis. Stat. §§ 765.09(2), 765.09(3).

(3) Both parties must also complete a marriage license worksheet. Wis. Stat. § 765.13.

(4) The couple must pay a fee of $49.50 for the marriage license. Wis. Stat. § 765.15.

(5) After the couple completes the application for a marriage license, a number of individuals (including the district attorney and certain relatives of the applicants) have the opportunity to object to the proposed marriage and ask for a court order requiring the

parties to the application to show cause why the marriage should not be refused. Wis. Stat. § 765.11. A court must make an order reusing the marriage license upon a finding that the statements in the application are willfully false or insufficient, or that either or both of the applicants are not competent in law to marry. Wis. Stat. § 765.11.

(6) No marriage license may be issued within 5 days of application for the marriage license; however, the county clerk may, at his or her discretion, issue a marriage license within less than 5 days if the applicant pays an additional fee of not more than $25 to cover any increased processing cost incurred by the county. Wis. Stat. § 765.08.

Once the clerk issues the license, the parties wishing to marry have 30 days in which to perform the required marriage ceremony. Wis. Stat. § 765.12. To achieve the legal status of husband and wife, a marriage ceremony is required to have the following elements:

(1) The parties must make mutual declarations that they take each other as husband and wife. Wis. Stat. § 765.16.

(2) The mutual declarations must be made before a state authorized officiant (or without an officiant under specified statutory circumstances). Wis. Stat. §§ 765.16, 765.17.

(3) Those mutual declarations must be made before two additional competent adult witnesses: i.e., they must be public declarations. Wis. Stat. § 765.17.

After the ceremony, the marriage paperwork is then completed by the officiant and witnesses and returned to the register of deeds of the county in which the marriage was performed (which is not necessarily the same county to which the application was made). Wis. Stat. § 765.19.

The process by which an opposite-sex couple forms a marriage and a same-sex couple forms a domestic partnership are similar in the following respects:

(1) Both must register at the county clerk's office in a county in which one applicant has lived at least 30 days (compare Wis. Stat. § 765.05 with Wis. Stat. § 770.07(1)(a)).

(2) Both must disclose their social security numbers and show the same proof of identification (compare Wis. Stat. §§765.09(2), 765.09(3) with Wis. Stat. §§ 770.07(1)(c), 770.07(1)(d)).

(3) Both must pay the same fee (Wis. Stat. § 770.17 states that the declaration fee will be the same as the marriage license fee).

(4) Both must wait the same number of days (compare Wis. Stat. § 765.08(1) with Wis. Stat. § 770.07(1)(b)(1)).

(5) Both can accelerate the process by paying an additional fee (compare Wis. Stat. § 765.08(2) with Wis. Stat. § 770.07(1)(b)(2)).

(6) Both must give the completed paperwork for recording to the register of deeds (compare Wis. Stat. § 765.19 with Wis. Stat. § 770.10) who then forwards the information to the state registrar of vital statistics (compare Wis. Stat. § 765.13 with Wis. Stat. § 770.10).

However, like the eligibility criteria for both statuses, there are far more differences than similarities in the process by which an opposite-sex couple forms a marriage and a same-sex couple forms a domestic partnership. First, and most significantly, a ceremony is required to form a marriage, whereas no ceremony is required to form a domestic partnership. *See* Wis. Stat. §§ 765.16, 765.17, and 765.19. Plaintiffs dismiss the solemnisation requirement as insignificant because there is no legal prohibition on domestic partners holding a ceremony and because many couples do, in fact, have a ceremony with complete wedding clothes and rings. (Pls.' Supp. Br. 9). Plaintiffs, however, miss the point – the ceremony is a *legal requirement* associated with the legal status of marriage. (Emphasis added.). Under Wisconsin law, couples are not legally married until they conduct such a ceremony. In contrast, a domestic partnership "ceremony" (to the extent that same-sex couples choose to have one) is, in the eyes of the law, irrelevant. Domestic partners have no legal obligation to make mutual declarations before an officiant and witnesses that they take each other as domestic partners. *See id*. Rather, filing a proper form with the register of deeds is the singular element in the formation of a domestic partnership. Wis. Stat. § 770.10.

Second, opposite-sex couples who have lived together for one year since their ceremony are considered legally married even if there are certain irregularities with their marriage license. Wis. Stat. § 765.23. Specifically:

> [n]o marriage hereafter contracted shall be void either by reason of the marriage license having been issued by a county clerk not having jurisdiction to issue the same; or by reason of any informality or irregularity of form in the application for the marriage license or in the marriage license itself, or the incompetency of the witnesses to such marriage; or because the marriage may have been solemnized in

> a county other than the county prescribed in s. 765.12, or more than 30 days after the date of the marriage license, if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

Id. In contrast, no ceremony can substitute for the paperwork required to form a domestic partnership. In fact, the only way to form a domestic partnership is to complete and sign the declaration, acknowledged by a notary, and submit the declaration to the register of deeds. Wis. Stat. § 770.10.

Third, non-Wisconsin residents can apply for a marriage license in the county in which the marriage ceremony is to be performed. Wis. Stat. § 765.05. In contrast, there is no similar provision that allows non-Wisconsin residents to apply for a domestic partnership declaration within the State. Instead, one of the parties must live in the county in which they file an application for a declaration for a domestic partnership for at least 30 days. Wis. Stat. § 770.07(1)(a).

Fourth, couples seeking to get married must complete a marriage license worksheet (Wis. Stat. § 765.13); however, there is no similar step requiring a couple seeking to form a domestic partnership to complete a "domestic partnership worksheet."

Fifth, after an opposite-sex couple completes the application for a marriage license, a number of individuals have the opportunity to object to the proposed marriage. Wis. Stat. § 765.11. In contrast, no one is given the opportunity to object to a proposed domestic partnership.

Finally, an opposite-sex couple can accelerate the marriage application process by paying a fee of not more than $25. Wis. Stat. § 765.08. However, same-sex couples seeking to accelerate the application for a domestic partnership declaration process must only pay a fee of no more than $10. Wis. Stat. § 770.01(1)(b). Together, the vast difference in the processes by which each status is formed is further proof that the state does not recognize domestic partnerships in a way that is substantially similar to the recognition of marriage.

3. The process of termination

Finally, the process by which a domestic partnership is terminated compared to how a marriage is terminated is the most striking difference between the two legal statuses. Specifically, either partner is free to withdraw at will from a domestic partnership:

> 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 the fee under s. 770.17. The notice must be signed by one or both domestic partners and notarized.

Wis. Stat. § 770.12(1)(a). Moreover, a domestic partnership automatically terminates if one of the partners get married:

> 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.

Wis. Stat. § 770.12(4)(b).

In contrast, there are three steps to terminate a marriage through divorce. First, a spouse must obtain permission to get a divorce through the courts after a 120 day waiting period following the service of the summons and petition for divorce upon the other spouse.[81] Wis. Stat. § 737.335(1). Second, an assignment must be made of debt and property between the two parties. Wis. Stat. § 767.61. Finally, a determination must be made regarding the responsibility for maintenance between the spouses and legal custody and support of any minor children. Wis. Stat. § 767.385.

The processes by which each status is terminated are similar in no respects. In contrast to marriage, party who wishes to exit a domestic partnership does not have to seek the State's permission to dissolve it. Rather, a party may unilaterally revoke his or her domestic partnership status by simply filing a notarized notice of termination with the county clerk. The fact that the

[81] A spouse does not have to go through the 120 day waiting period if the case of an emergency if the court orders, "after consideration of the recommendation of a circuit court commissioner, directing an immediate hearing on the petition for the protection of the health or safety of either of the parties or of any child of the marriage or for other emergency reasons consistent with the policies of this chapter." Wis. Stat. § 767.335(2).

process by which a domestic partnership is terminated is fundamentally different from the process by which a marriage is terminated proves that the state does not recognize the legal statuses in a substantially similar manner.

B. The benefits, rights, and responsibilities the state confers on domestic partners and spouses

The state confers drastically different benefits, rights, and responsibilities to domestic partners solely by virtue of the domestic partnership status in comparison to the benefits, rights, and responsibilities given to spouses because of their marriage status.

1. Domestic partners' rights

Once registered under Chapter 770, domestic partners are granted certain rights and benefits that are also given to married spouses. However, the vast majority of rights provided to domestic partners are rights that the law also grants to parents, children, family members, and sometimes "close friends." *See, e.g.,* Wis. Stat. §§ 50.06(3), 50.94(3)(a). Other rights given to registered domestic partners can be obtained by any two people by executing certain documents. The following is a summary of the rights given to spouses that are granted to domestic partners solely by virtue of their domestic partnership status, along with a discussion of which of the rights are also given to other individuals:

Victim Notification by the Department of Corrections: If his/her domestic partner died as a result of an offender's crime, the surviving partner has the right to be notified by the Department of Corrections of the 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. Wis. Stat. §§ 301.38(1)(a), 301.46(3)(a)(1),

302.105(1)(a), 304.06(1)(a)(1), 304.09(1)(a). This is a right that is also given to a child, sibling, parent, or legal guardian of an individual who died as a result of an offender's crime. *Id*.

Evidence – Privileges: A domestic partners has the right to prevent his/her current or former partner from testifying as to any private communication during their domestic partnership. Wis. Stat. § 905.05. However, in addition to the spousal and domestic partner privilege, Wisconsin law also has evidentiary privileges that are available to a health care provider and a patient, an attorney and a client, and a clergy member and a parishioner. Wis. Stats. Chapter 905.

Damages, Recovery, and Miscellaneous Provisions Regarding Actions in Court: A domestic partner has the right to bring an action for the wrongful death of his/her registered partner and to recover the proceeds from such action after the required set-asides for the decedent's minor children are made. Wis. Stat. § 895.04. This right is also granted to the deceased individual's lineal heirs if there is no surviving spouse or domestic partner. *Id*.

Crime Victim Compensation Program: A domestic partner has the right to receive compensation if his/her partner was the victim of certain crimes, including compensation for the cost of medical treatment, lost wages, funeral and burial expenses, loss of support to dependents, and replacement costs of any clothing or bedding that is held for evidentiary purposes. Wis. Stat. §§ 949.01(2), 949.03, 949.05(1)(c), 949.06. This right is given not only to domestic partners and spouses, but to any person that qualifies as a "dependent" under the statute. Under Wis. Stat. § 949.01(2), a "dependent" is defined as "any spouse, domestic partner under ch. 770, parent, grandparent, stepparent, child, stepchild, adopted child, grandchild, brother, sister, half brother, half sister, or parent of spouse or of domestic partner under ch. 770, of a deceased victim who was wholly or partially dependent upon the victim's income at the time of the victim's death and includes any child of the victim born after the victim's death."

Ownership of Property – Joint Tenancy: Domestic partners named as owners in a document of title, transferees in an instrument of transfer, or buyers in a bill of sale, have a rebuttable presumption 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.[82] Wis. Stat. § 700.19(2m). While only spouses and domestic partners have a rebuttable presumption that they own property as joint tenants, any two or more people may hold real property titled as joint tenants with rights of survivorship. Wis. Stat. § 700.17.

Administration and Transfer of a Deceased Individual's Estate: A domestic partner has the following rights related to the administration and transfer of his/her deceased partner's estate: to have certain provisions in favor of a former domestic partner automatically revoked upon the termination of the domestic partnership or other event or proceeding that would exclude a person as a surviving domestic partner[83]; with exceptions, to receive a share of his/her deceased domestic partner's estate if the deceased partner had a will but it was executed before registration of the partnership (Wis. Stat. §§ 852.11(2m), 852.12)[84]; to receive property of his/her deceased

[82] 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. (Pines Aff. Ex. 29, LFB Paper #391 p. 15).

[83] Domestic partners would receive this right because Wis. Stat. § 854.15(1)(b)(2) provides that a "divorce, annulment or similar event" includes a termination of a domestic partnership, or other event or proceeding that would exclude a person as a surviving domestic partner. Furthermore, Wis. Stat. § 854.15(1)(c) provides that a "former spouse" includes a person whose domestic partnership with the deceased individual had been the subject of a "divorce, annulment or similar event." The law provides that 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…; (2) revokes any disposition created by law to the former spouse or a relative of the former spouse…; (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 interest of the deceased individual and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship martial property and transforms the interests of the decedent and former spouse into tenancies in common." (Pines Aff. Ex. 29, LFB Paper #391 p. 15).

[84] Notwithstanding a 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 receives "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." (Pines Aff. Ex. 29, LFB Paper #391 p. 16). However, "a surviving domestic partner is not entitled to a portion of the deceased partner's estate 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." *Id*.

domestic partner if the partner dies intestate (Wis. Stat. §§ 852.01, 852.09); with limitations, to file with the court a written selection of personal property belonging to his/her deceased domestic partner (Wis. Stat. §§ 859.25, 861.33)[85]; to receive his/her deceased domestic partner's share in the home occupied by him/her if that interest was not specifically assigned to another under a will (Wis. Stat. § 862.21); to petition the court to set aside from claims of creditors some property as is necessary for the support of the surviving domestic partner (Wis. Stat. §§ 851.17, 859.25, 861.41)[86]; if the court determines it is necessary or appropriate, to receive an allowance from a deceased domestic partner's estate (Wis. Stat. §§ 851.17, 859.25, 861.31, 861.35); and to utilize summary probate procedures when the estate is small and the decedent is survived by his/her domestic partner (Wis. Stat. § 867.01)[87]. However, any person without a spouse or registered domestic partner may make a will disposing of his/her property after death in a way that accomplishes virtually all of the post-death transfers and preferences that are by default granted to surviving domestic partners and surviving spouses.

Active State Duty National Guard Member Civil Relief: A domestic partner is protected from eviction during the period of his/her domestic partner's active state service in the National Guard. Wis. Stat. § 321.62(11)(a). However, this is a right that is also given to an active state service member's child and dependents. *Id.*

[85] 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… domestic partner; (2) automobile; (3) household furniture, furnishing and appliances; and (4) other tangible personal property not used in trade, agriculture or other business, not to exceed $3,000 in inventory value." (Pines Aff. Ex. 29, LFB Paper #391 p. 16). However, "[t]his selection of personal property may not include items specifically bequeathed to another individual, except that the surviving... domestic partner may in every case select the normal household furniture, furnishings, and appliances necessary to maintain the home." *Id*.

[86] The law provides that "once the amount of claims against the deceased individual's estate has been ascertained the surviving domestic partner may petition the probate courts to et 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 allowance." (Pines Aff. Ex. 29, LFB Paper #391 p. 16).

[87] 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 [domestic partner] or one or more minor children or both." (Pines Aff. Ex. 29, LFB Paper #391 p. 17).

Rights of Residents in Care Facilities: A domestic partner receives the same visitation and accompaniment rights that are given to the spouse of a patient or resident of an adult family home, residential care apartment complex, community-based residential facility ("CBRF"), nursing home, hospital, and hospice. Wis. Stat. §§ 50.032(2d), 50.033(2d), 50.034(3)(e), 50.035(2d), 50.04(2d), 50.09(1)(f), 50.36(3j), 50.942.

Consent to Admissions to Nursing Homes, CBRFs, and Hospices: A domestic partner can consent to his/her incapacitated partner's admission from a hospital to a nursing home or CBRF, or directly to a hospice, if the incapacitated partner does not have a valid power of attorney for health care and has not been adjudicated incompetent. Wis. Stat. §§ 50.06(2)(am), 50.06(3), 50.94(3)(a). In certain circumstances, this right may also be granted to an adult son/daughter, a parent, an adult brother or sister, a grandparent, an adult grandchild, or an adult close friend. *Id*.

Mental Illness, Developmental Disability and Alcohol and Other Drug Abuse (AODA) Treatment Records: A domestic partner has the right to access the treatment records of his/her partner in certain situations. Wis. Stat. § 51.30(4). However, an individual's adult children and siblings may obtain the individual's medical records on the same terms as a domestic partners and spouse. *Id*.

Health Care Records: A domestic partners is included in the definition of "person authorized by the patient" for the purposes of disclosure and release of his/her deceased partner's health care records. Wis. Stat. § 146.81(5). The definition also includes a "personal representative," which therefore means that the right is not exclusive to domestic partners and spouses. *Id*.

Power of Attorney for Property and Finances: By terminating the domestic partnership, a domestic partner automatically revokes/invalidates authorization under a power of attorney for property and finances for a partner to act as his/her agent. Wis. Stat. §§ 244.02, 244.10(2)(e).

Power of Attorney for Health Care: A domestic partner has the following rights related to power of attorney for his/her partner: to be included in the definition of "relative" for the purpose of designating a power of attorney for health care (Wis. Stat. § 155.01(12)); to be included in the list of relatives prohibited from acting as a witness to the execution of power of attorney for health care (Wis. Stat. § 155.10(2)(a)); and to automatically revoke/invalidate authorization under a power of attorney for health care for a domestic partner to act as his/her agent through termination of the partnership (Wis. Stat. § 155.40(2)). However, in addition to a spouse and domestic partner, the following individuals are included in the definition of "relative" for the purpose of designating a power of attorney for health care: an individual related by blood within the third degree of kinship as computed under Wis. Stat. § 990.001(16); an individual related to a spouse or domestic partner within the third degree as so computed; and an individual in an adoptive relationship within the third degree. Wis. Stat. § 155.01(12). Moreover, not only are spouses and domestic partners included in the list of relatives prohibited from acting as a witness to the execution of power of attorney for health care, but so are individuals related to the principal by blood or adoption. Wis. Stat. § 155.10(2)(a).

Consent to Autopsies: A domestic partners can consent to the performance of an autopsy by a licensed physician if the individual takes custody of his/her deceased partner's remains. Wis. Stat. § 157.05. However, consent to the performance of an autopsy can be "given by whichever one of the following assumes custody of the body for purposes of burial: Father, mother, husband, wife, child, guardian, next of kin, domestic partner under chapter 770, or in the absence of any of the foregoing, a friend, or a person charged by law with the responsibility for burial." *Id*.

AIDS/HIV Health Insurance Premium Subsidy Program: A domestic partner has the right to receive health insurance premium and medical leave premium subsidies available to residents with HIV and has the option to apply those subsidies to policies that also cover one's partner.

Wis. Stat. §§ 252.16, 252.17.[88] However, health insurance premium and medical leave premium subsidies are available to any resident who meets the statutes' qualifications. Wis. Stat. §§ 252.16(3), 252.17(3). In addition, any resident that meets the statutes' qualifications has the option to apply those subsidies to policies that cover not only their spouse or domestic partner, but also policies that cover their dependents. Wis. Stat. §§ 252.16, 252.17.

Insurance Provided by Fraternal Organizations: A domestic partner can sometimes receive insurance benefits though the fraternal organization that employs his/her partner. Wis. Stat. § 614.10. However, a fraternal organization can also provide insurance benefits to an employee's child that receives financial services or support from the employee. Wis. Stat. § 614.10(2)(c)(3).

Notifications Made to Family Members Following the Release of Certain Persons: A domestic partner is included in the definition of "family members" 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) Department of Health Services ("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 if the victim died as a result of the act of sexual violence for which the individual was in custody. Wis. Stat. §§ 971.17(4m), 971.17(6m), 980.11. However, the definition of "member of the family" also includes a child, sibling, parent or legal guardian. *Id*.

[88] 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"). Wis. Stat. § 252.16. (Pines Aff. Ex. 29, LFB Paper #391 p. 19). The subsidy is provided to individuals whose policy also covers the individual's domestic partner. *Id*. 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. Wis. Stat. § 252.17. (Pines Aff. Ex. 29, LFB Paper #391 p. 19). The subsidy is provided for any plan that also covers an individual's domestic partner. *Id*.

Real Estate Transfer Fee: Domestic partners are exempted from the real estate transfer fee for conveyances of real property between partners. Wis. Stat. § 77.25(8n).[89] While transfers of real property between spouses and between domestic partners are exempt from real estate transfer fees, so are certain transfers between parent and child, stepparent and stepchild, parent and son-in-law, and parent and daughter-in-law, as well as transfers from a subsidiary corporation to a parent corporation, transfers between agent and principal, and transfers by will or survivorship. *Id*.

Family and Medical Leave: A domestic partner receives protected unpaid time off from work to care for his/her sick or injured partner. Wis. Stat. § 103.10.[90] However, this right is also available with respect to sick or injured children and parents. *Id*.

Worker's Compensation Death Benefits: A domestic partner has the right to receive death benefits under the Worker's Compensation system in connection with the death of his/her partner. Wis. Stat. §§ 102.49, 102.51. However, in addition to dependent spouses and dependent domestic partners, the following dependent individuals have a right to receive death benefits under the Worker's Compensation system in connection with the death of a decedent: a child under the age of 18 years upon the parent with whom he or she is living at the time of the death of the parent, there being no surviving dependent parent; and a child over the age of 18 years, but physically or mentally incapacitated from earning, upon the parent with whom he or she is living at the time of the death of the parent, there being no surviving dependent parent. *Id*.

Employee Cash Bonds Held in Trust: A domestic partner has the right to receive any cash bond held in trust by his/her partner's employer after the death of his/her partner. Wis. Stat. § 103.165. However, if a decedent dies without a spouse or domestic partner, the decedent's

[89] 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. (Pines Aff. Ex. 29, LFB Paper #391 p. 20).

[90] Wis. Stat. § 103.10 was amended by 2011 Wisconsin Act 16.

children, father or mother, or brother or sister, may have a right to receive any cash bond held in trust by the decedent's employer. *Id*.

Wage Payments: If their partner dies, a domestic partner has the right to receive their partner's unpaid wages from their partner's employer. Wis. Stat. § 109.03(3).[91] However, if no spouse or domestic partner exists at the time of the decedent's death, the right to the decedent's unpaid wages goes to the decedent's children, parents, or siblings. *Id*.

Insurance for Employees of Local Governmental Units: A domestic partner can sometimes receive payment of hospital, surgical and other health, accident, and life insurance premiums through the state or local governmental unit that employs his/her partner. Wis. Stat. § 66.0137(5)(b). However, state and local governmental units can also provide payment of hospital, surgical and other health, accident, and life insurance premiums for employees' dependent children. *Id*.

Manufactured Home Title Transfer Fee: A domestic partner has the right to be exempted from the title fee when a manufactured home is transferred from a decedent to his/her surviving partner. Wis. Stat. § 101.9208(4m).

Motor Vehicle Titles: A domestic partner has the right to be exempted from the title fee when a vehicle is transferred from a decedent to his/her surviving partner. Wis. Stat. § 342.14(3m). Upon demonstration of personal liability for any remaining debt, a domestic partner receives title of a vehicle previously titled in his/her partner's name after the partner dies. Wis. Stat. § 342.17(4)(b).

[91] Wis. Stat. § 109.03 was amended by 2011 Wisconsin Act 10. The secretary of state designated March 25, 2011, as the date of publication for this act pursuant to Wis. Stat. § 35.095(b)(b). On March 18, 2011, the Dane County Circuit Court enjoined the secretary of state from publishing 2011 Wisconsin Act 10 until further order of the court. Pursuant to Wis. Stat. § 35.095(3)(a), the Legislative Reference Bureau is required to publish every act within 10 working days after its date of enactment. *See* 2011 WL 924048 and 2011 WL 1135602.

2. Spouses' rights

In addition to receiving the same rights as domestic partners, spouses are also granted countless additional rights, benefits, and responsibilities solely as the result of a marriage. It would take pages to list each of the state statutes that name legal rights and responsibilities that stem from a marriage. However, a non-exhaustive list of some of the rights granted to spouses but not to domestic partners include, but are not limited to, the following:

(1) Spouses acting jointly for political purposes are considered an "individual" rather than a "committee" for purposes of compliance with the registration requirements of political committees, groups, and individuals. Wis. Stat. § 11.05(10).

(2) Spouses of political candidates are exempt from certain contribution limits to the candidate spouse's campaign. Wis. Stat. § 11.26.

(3) A spouse is included in the definition of "immediate family" when the term is used with reference of a candidate. Wis. Stat. § 11.501(9).

(4) Spouses may obtain joint fishing licenses. Wis. Stat. § 29.219(4).

(5) Spouses qualify for certain reductions in tuition for schools within the University of Wisconsin System and the Wisconsin Technical College System. Wis. Stat. §§ 36.27, 38.24.

(6) An elderly spouse can participate in the authorized meal programs. Wis. Stat. §§ 36.51, 38.36.

(7) A spouse can transfer a tuition gift certificate in his/her name to his/her spouse to pay all or a portion of nonresident tuition or academic fees, study-abroad program fees at any University of Wisconsin System institution or college campus. Wis. Stat. § 36.53.

(8) Surviving spouses of Wisconsin veterans are, upon death, eligible for burial in Wisconsin veterans' cemeteries. Wis. Stat. § 45.61(2).

(9) Burial allowances are available for spouses of Wisconsin veterans who die without sufficient means to defray burial expenses. Wis. Stat. § 45.84(1).

(10) Un-remarried spouses of deceased veterans are eligible for loans under the state veterans housing loan program. Wis. Stat. § 45.33(c).

(11) Un-remarried spouses of veterans who died on active duty are eligible for short term assistance for subsistence and health care. Wis. Stat. § 45.40(2m).

(12) Un-remarried spouses of deceased veterans are eligible for personal loans from the state. Wis. Stat. § 45.42(2).

(13) Spouses and surviving spouses of veterans are eligible for admittance to veterans' homes. Wis. Stat. § 45.51(2).

(14) The State cannot enforce a lien on a decedent's home to pay for costs owned for long term community support services if the decedent has a surviving spouse. Wis. Stat. § 46.27(7g)(6).

(15) A spouse is included in the definition of "relative" for purposes of Chapter 28. Wis. Stat. § 48.02(15).

(16) A child may be adopted by a husband and wife, or by the husband or wife of a person who is a child's parents. Wis. Stat. § 48.82(1).

(17) The State cannot obtain a lien on the home of a nursing home patient to pay for costs of nursing home care if the patient's spouse is living in the home. Wis. Stat. § 49.496(2)(b).

(18) Marital status is a consideration in equal opportunities for house. Wis. Stat. § 66.1011.

(19) A spouse may control the final disposition, including the location, manner, and conditions of the final disposition of their deceased spouse's remains. Wis. Stat. § 154.30(2)(2).

(20) Spouses may claim exemptions when marital property is subject to levy, execution, or sale in satisfaction of consumer debt. Wis. Stat. § 425.106(2).

(21) Cancellation and non-renewal of an auto insurance policy is prohibited based on marital status. Wis. Stat. § 632.35.

(22) Insurers offering group health benefits plans must offer special enrollment periods to allow persons who marry coverage-eligible individuals to enroll. Wis. Stat. § 632.746(7)(a).

(23) Former spouses may elect to continue receiving health insurance previously received through their spouses. Wis. Stat. §§ 632.897(2)(b) and (9)(b).

(24) A presumption that all property of spouses is marital property. Wis. Stat. § 766.31(2).

(25) Subject to certain exceptions, each spouse has a present undivided one-half interest in each item of marital property. Wis. Stat. § 766.31(3).

(26) Only spouses may be parties to a marital property agreement, which is enforceable without separate consideration. Wis. Stat. § 766.58(1).

(27) The ownership interest and proceeds of a life insurance policy owned by one spouse are generally deemed marital property. Wis. Stat. § 766.61(3)(a).

(28) A deferred employment benefit attributable to the employment of a spouse after marriage is generally deemed marital property. Wis. Stat. § 766.62(1).

(29) A spouse may bring a claim for breach of the duty of good faith imposed on the other spouse if breach causes damage to the claimant spouse's property. Wis. Stat. § 766.70(1).

(30) Upon request of a spouse, a court may order an accounting of the spouses' property and obligations and may order the name of the requesting spouse added to documents reflecting ownership of marital property. Wis. Stat. §§ 766.70(2) and (3).

(31) If marital property has been or is likely to be substantially injured by a spouse's gross mismanagement, waste, or absence, the other spouse may seek a court order to limit the offending spouse's management and control rights in the marital property or to change the classification of the property (among other remedies). Wis. Stat. § 766.70(4).

(32) If a person fails to provide for support of his or her spouse, the spouse may file an action to compel support. Wis. Stat. § 767.61.

(33) A court may require a former spouse to pay maintenance to his or her former spouse. Wis. Stat. § 767.61.

Plaintiffs admit that not all of the legal incidents of marriage are conferred on domestic partnerships. (Pls.' Supp. Br. 12). However, they contend that that is not the relevant question because a "relationship that is identical to or substantially similar to marriage need not contain all or almost all of marriage's legal incidents." (*Id*. at 43). Instead, Plaintiffs argue that Chapter 770 violates the Marriage Amendment because it is calculated to confer the same social status of marriage. (*Id*. at 44-45). They argue that a "substantially similar" status "is one that can be seen as a form of marriage for same-sex couples, *i.e*., for two person in an intimate relationship in some sense mirroring that between a married man and woman." (*Id*. at 12.). Plaintiffs allege that it is the "existence of an exclusive, intimate relationship – clearly implicit in Chapter 770 – that creates the substantially similar status prohibited by the Amendment." (*Id*.).

Furthermore, Plaintiffs urge this court to ignore the evidence of the plain language, constitutional debates, and earliest interpretations by the legislature and instead adopt their explanation of the "general purpose" of the Marriage Amendment. According to Plaintiffs,

Wisconsin voters ratified the Marriage Amendment to further the general purpose of promoting a conjugal model of marriage. (Pls. Support Br. 31-35). Plaintiffs' conjugal model views the central purpose of marriage as providing a means by which society can channel sexual desires between men and women into a legal institution that reflects the belief that children do best when reared by their biological mother and biological father. (*Id*. at 31-32).

Plaintiffs' arguments are unavailing for two reasons. First, as this court has repeatedly stated, the Marriage Amendment prohibits a *legal status* that is identical or substantially similar to the *legal status* of married individuals. (Emphasis added.). As stated above the legal status of domestic partners is substantially different than that of married spouses.

Second, even if the court ignored the fact that there is no evidence that voters ratified the Marriage Amendment with the intent to further a conjugal model of marriage, Plaintiffs' argument is still unpersuasive. Assuming, arguendo, the purpose of marriage is to accommodate the potentially procreative nature of heterosexual relationships, then it is undisputed that domestic partnerships do not have the same purpose because there is no potential for a homosexual relationship to be procreative. Therefore, Plaintiffs' argument about the purpose of marriage supports the conclusion that domestic partnerships are not substantially similar to marriage.

Ultimately, it is clear that Chapter 770 does not violate the Marriage Amendment because it does not create a legal status for domestic partners that is identical or substantially similar to that of marriage. The state does not recognize domestic partnership in a way that even remotely resembles how the state recognizes marriage. Moreover, domestic partners' have far fewer legal rights, duties, and liabilities in comparison to the legal rights, duties, and liabilities of spouses. Chapter 770 is not even close to similar to a Vermont-style civil union, which extends virtually all the benefits spouses receive to domestic partners. Instead, Chapter 770 is simply a legal

construct created to provide some benefits to same-sex couples. As a result, Chapter 770 does not violate the Marriage Amendment is therefore constitutional.

CONCLUSION AND FINAL ORDER

Chapter 770 does not create a legal status for domestic partners that is identical or substantially similar to that of marriage. Therefore, Chapter 770 does not violate the Marriage Amendment. As a result, Intervening Defendants' motion for summary judgment is **GRANTED** and Plaintiff's motion for summary judgment is **DENIED**.

Dated: This 20th day of June, 2011.

By the Court:

Daniel R. Moeser

Judge Daniel R. Moeser
Circuit Court Judge

Research and drafting assistance provided by staff attorney Jessica Joy Glad