Appeal No. 2011AP1572 Cir. Ct. No. 2010CV4434

WISCONSIN COURT OF APPEALS
DISTRICT IV

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

PLAINTIFFS-APPELLANTS,

V.

JAMES E. DOYLE, KAREN TIMBERLAKE AND JOHN KIESOW,

DEFENDANTS-RESPONDENTS,

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

INTERVENING DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Higginbotham and Brennan, JJ.

We certify this appeal to the Wisconsin Supreme Court to determine whether Wisconsin's domestic partnership legislation violates the Wisconsin Constitution's marriage amendment. Specifically, this case presents the question whether the domestic partnership legislation creates "[a] legal status ... substantially similar to that of marriage for unmarried individuals," as prohibited by the marriage amendment.

A decision in this case will clarify the meaning of the marriage amendment and its application to Wisconsin's domestic partnership law. Because this case involves a novel constitutional issue and because a decision in this case will have statewide significance, we certify this appeal to the Wisconsin Supreme Court for its review and determination.

Background

In November 2006, Wisconsin adopted the marriage amendment as part of the state constitution. WIS. CONST. art. XIII, § 13. The marriage amendment provides: "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." ***Id.*** In June 2009, the Wisconsin legislature "establish[ed] and provid[ed] the parameters for a legal status of domestic partnership" for same-sex couples, WIS. STAT. ch. 770. *See* 2009 Wis. Act 28, § 3218.

Julaine Appling and several others (collectively Appling) brought this action to challenge the constitutionality of the domestic partnership legislation. Fair Wisconsin, Inc., and several individuals (collectively Fair Wisconsin) intervened as defendants. Appling and Fair Wisconsin both moved for summary judgment. The circuit court granted summary judgment to Fair Wisconsin, declaring the domestic partnership legislation constitutional. Appling appeals.

Discussion

"The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it." ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408. There are three primary sources for interpreting a constitutional amendment: "the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption." ***Id.***

Appling contends that the marriage amendment prohibits the domestic partnerships created under WIS. STAT. ch. 770. She contends that the term "legal status" under the marriage amendment refers to the formation and recognition of a marriage-like *relationship* as opposed to referring to the *rights and responsibilities* flowing from that relationship. So far as we can tell, Appling concedes that, if the issue is whether domestic partnership rights and responsibilities are substantially similar to those accompanying marriage, then domestic partnerships are not substantially similar to marriage. That is, Appling does not dispute the circuit court's or Fair Wisconsin's view that there are significant differences between domestic partnership rights and responsibilities and marital rights and responsibilities.[1]

Focusing on the nature of the relationship, Appling identifies similarities in eligibility requirements and formation. For example, as to

[1] Appling does argue that the rights of domestic partnerships are a subset of marital rights and that "bundling" these rights in a way previously bundled for marriage only adds to the similarity. But we do not understand Appling to be arguing that the respective bundles are substantially similar.

requirements, Appling notes that, like marriage, domestic partnerships are limited to two persons of a specified sex who are not too closely related by blood. As to formation, Appling notes similarities, such as going to a county clerk, paying the same fee as a marriage license fee, and receiving a "declaration from the same official" that issues marriage licenses. Appling then contends that a domestic partnership is "substantially similar" to marriage because it shares these and other "defining characteristics" of marriage.

We understand a core part of Appling's argument to be her contention that marriage is unique in the law as "an exclusive, sex-specific, two-person, consensual relationship between persons of a certain age that, because of its sexual nature, may not be shared by persons too closely related by blood." Appling contends that the marriage amendment was presented to the public as a referendum on how we, as a state, define what marriage is. Appling asserts that voters were asked to draw a distinction between two models of marriage:

(1) the "conjugal model," designed around the procreative function and the joint parenting by a man and woman of the children of their union, and

(2) the "close relationship" model, designed around a private relationship between two people and focused on the happiness and intimacy of that relationship.

According to Appling, same-sex couples in domestic partnerships can only fit the "close relationship" model. Thus, Appling contends, the domestic partnership legislation is unconstitutional because it provides legal validation for the "close relationship" model, a model Wisconsin voters intended to prohibit by voting for the marriage amendment.

Fair Wisconsin responds that the term "legal status" in the marriage amendment refers to the way a relationship is *treated* under the law. In support, Fair Wisconsin cites a dictionary definition of "status" as "[a] person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations ...." *See* BLACK'S LAW DICTIONARY 1542 (9th ed. 2009). Fair Wisconsin then contends that a domestic partnership is *not* "substantially similar" to a marriage because the rights and obligations that come with domestic partnership recognition are substantially different than marital rights and obligations. Fair Wisconsin highlights several differences in rights and obligations, arguing that these differences make it clear that the legal status created by the domestic partnership law is not "substantially similar" to marriage. *See, e.g.*, WIS. STAT. §§ 905.05, 895.04, 700.19(2) and (2m), 321.62(11)(a), 146.81(5), 103.10, and 51.30(4) (examples of rights provided to both spouses and domestic partners); *see also* WIS. STAT. §§ 11.05(1), 11.26, 36.53, 45.61(2), 45.84(1), 48.82(1), 154.30(2)2., and 767.61 (examples of rights afforded to spouses, but not domestic partners). Fair Wisconsin contends that there is no evidence supporting Appling's argument that voters intended to define marriage in terms of a "conjugal model" and to prohibit legal recognition of adult relationships that do not fit that model.

Both parties cite public statements by opponents and proponents of the marriage amendment that were made prior to the time the electorate voted as evidence of the electorate's understanding. Appling points to statements of amendment opponents to the effect that the type of challenge Appling now brings might invalidate domestic partnerships. Fair Wisconsin points to assurances by Appling and other amendment proponents that domestic partnerships would not be

prohibited. We are unsure, based on the briefing before us, whether the public debate sheds much light on the electorate's intent.

Finally, the parties dispute whether it is appropriate to look to WIS. STAT. ch. 770 itself as evidence of the meaning of the marriage amendment. *See* ***Dairyland***, 295 Wis. 2d 1, ¶19 (primary sources of constitutional interpretation include "the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption"). Appling contends that, because here the earliest adopted legislation is the very legislation at issue, it is not appropriate to look to that legislation as evidence of the amendment's meaning. Fair Wisconsin argues that, in this case, the legislation is strong evidence of the amendment's meaning.

We perceive nothing particularly complicated in the parties' dispute over the meaning of the marriage amendment and its application to Wisconsin's domestic partnership law. We therefore perceive no reason why the supreme court might benefit from the refinement of issues that sometimes occurs when a dispute first works its way through briefing and decision in the court of appeals. Thus, in light of the statewide importance of the issue and the desirability of a prompt and final resolution, we certify this appeal to the Wisconsin Supreme Court.