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Mr. Michael P. May
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Dear Mr. May:

You advise that the City of Madison allows persons who are not legally married but are living together in a committed personal relationship to register as "domestic partners." Madison, Wis., Code of Ordinances § 3.23(2)(o) and (11) (2006).

You state that the city protects registered domestic partners from discrimination in places of public accommodation, Madison, Wis., Code of Ordinances § 3.23(5), and that the city provides benefits, including partial payment of health insurance, to domestic partners of its employees through collective bargaining agreements.

You ask whether the ability of the City of Madison to provide these protections and benefits to domestic partners has been restricted by the adoption of Wis. Const. art. XIII, § 13, which provides in part that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

I have concluded that this provision does not restrict the ability of governmental bodies to protect domestic partners from discrimination, or the ability of either governmental or private employers to provide benefits to the domestic partners of their employees.

A constitutional provision should be construed to give effect to the intent of the legislators who framed it and the people who adopted it. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 19, ___ Wis. 2d ___, 719 N.W.2d 408. This intent is determined from the relevant circumstances which existed at the time the provision was adopted, including three primary sources: the plain meaning of the provision, the debates and practices at the time, and the earliest legislative action following adoption. *Id.*

This methodology is different from the rules used in construing statutes, which focus more on textual meaning than adoptive intent, and so do not consider extrinsic sources of interpretation in the absence of ambiguity. *Id.*, ¶ 114 (Prosser, J., concurring in part and dissenting in part). Construction of constitutional provisions requires greater reliance on extrinsic sources because these provisions do not become law until they are approved by the

people, who are more likely to rely on extrinsic sources, such as second-hand explanations and discussions, in forming a perception of what the provision is intended to accomplish and thus what they intend when they ratify it. *Id.*, ¶¶ 115-16.

The question here is whether the Legislature and the people intended to invalidate domestic partnerships when they adopted a provision which invalidates any legal status that is substantially similar to marriage.

Looking first at the language of this provision, *id.*, ¶ 117, the critical phrase "substantially similar to . . . marriage," is imprecise since the word "similar" has a range of meanings from mere general likeness to virtual identity. *State v. Hamilton*, 146 Wis. 2d 426, 431, 432 N.W.2d 108 (Ct. App. 1988). The precise meaning of the term must be determined from the context in which it is used. *Id.*

The purpose of a provision is part of the context that is relevant in ascertaining the meaning of its words. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶¶ 48-49, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, the purpose of Wis. Const. art. XIII, § 13, to limit the validity and recognition of marriage and marriage-like relationships is pertinent in determining the meaning of "similar" in this provision.

Provisions which have a purpose to restrict personal and property rights are construed strictly. 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 58:4 at 97-98 (6th ed. 2001 rev.). And under a strict construction, similarity entails more than incidentally shared characteristics. *Hamilton*, 146 Wis. 2d at 433. Things are "similar" when they are comparable, substantially alike or capable of standing in the place of each other. *Id.*

A specific intent to use "similar" with its strict meaning is evinced by the textual context of the term where it is preceded by the modifying adverb "substantially." According to recognized dictionaries, which can be used to determine the meaning of words, *Orion Flight Serv., Inc. v. Basler Flight Serv.*, 2006 WI 51, ¶ 24, 290 Wis. 2d 421, 714 N.W.2d 130, "substantially" means to a considerable degree. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (unabridged ed. 1986); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1791 (3d ed. 1996).

This modifier pushes the meaning of "similar" away from mere general likeness and much closer to virtual identity on the range of resemblance. Things are not substantially similar unless they have a considerable degree of similarity. The degree of similarity contemplated by the Legislature is suggested by Wis. Stat. § 77.51(14g)(h) (2003-04), which quantifies the phrase "substantially similar" to mean "80% or more."

The final corroborative clue to the meaning of "similar" is its contextual linkage to the word "identical" by the function word "or."

"Or" can signify the synonymous, equivalent or substitutive character of conjoined alternatives of like meaning. WEBSTER'S INTERNATIONAL DICTIONARY at 1585; AMERICAN HERITAGE DICTIONARY at 1271. Where "similar" is modified by "substantially," the juxtaposition of "similar" and "identical" as alternatives suggests that the phrase "substantially similar" is used with a meaning approximating "identical."

Although it may be difficult to plat the precise point where a legal status becomes substantially similar to marriage, it is clear that this point lies somewhere close to correspondence with marriage high up on the scale between likeness and identity.

Having discerned that substantial similarity is close to virtual identity, it is not difficult to determine that certain domestic partnerships do not approach the point of being substantially similar to marriage within the intended meaning of Wis. Const. art. XIII, § 13.

Although Madison domestic partnerships must have many of the attributes that are desirable in an exemplary marital relationship, the only qualifications they have in common with the legal status of marriage are that the partners must be adults who are competent to enter into contracts and are not married at the time the legal status is acquired. *Compare* Madison, Wis., Code of Ordinances § 3.23(1) *with* Wis. Stats. §§ 765.01 to .03 (2003-04). Other entities that choose to offer domestic partner benefits can set entirely different qualifications for those who receive the benefits they offer.

More importantly, marriage is a legal relationship, Wis. Stat. § 765.001(2) (2003-04), which provides the partners with a plethora of significant legally established rights including, for example, a right to marital property, which is a one-half undivided interest in the real and personal property acquired by either spouse during the marriage, Wis. Stat. ch. 766 (2003-04), a right to financial support by the other partner to the marriage, Wis. Stat. §§ 765.001(2) and 767.08(2) (2003-04), a presumption of paternity, Wis. Stat. § 891.41(1) (2003-04), which establishes a legal right to the custody of children born during the marriage, *Mrs. R. v. Mr. & Mrs. B.*, 102 Wis. 2d 118, 133-36, 306 N.W.2d 46 (1981), a right to file joint income tax returns, Wis. Stat. § 71.03(2)(d) (2003-04), a right to inherit from the other spouse, Wis. Stat. § 852.01(1)(a) and Wis. Stat. ch. 861 (2003-04), and a right to privacy in marital communications. Wis. Stat. § 905.05 (2003-04). Indeed, married couples are even entitled to a joint fishing license. Wis. Stat. § 29.219(4) (2003-04). Moreover, married persons have a right to continuation of their legal relationship with all its attendant rights unless it is dissolved by a court. Wis. Stat. § 767.07 (2003-04).

Domestic partners are not entitled to these or any of the many other legal benefits which are enjoyed by partners in a marriage. In Madison, domestic partners get only those fringe benefits that city employees are able to negotiate in their collective bargaining contracts for all employees. Other entities, either public or private, can provide entirely different benefits to those they consider domestic partners.

Madison's nondiscrimination rule does not bestow a benefit on domestic partners, but rather prohibits a potential penalty on people simply because they are domestic partners. And this prohibition is somewhat redundant since places of public accommodation are also prohibited from discriminating on the basis of marital status, Madison, Wis., Code of Ordinances § 3.23(5), which would prohibit discrimination against domestic partners because they are not married. Homosexual partners are also protected by the provision that prohibits discrimination on the basis of sexual orientation. *Id.*

Due to these sorts of disparities, numerous courts have concluded that a domestic partnership is not substantially similar to marriage. *E.g., Lowe v. Broward County*, 766 So.2d 1199, 1205-06 (Fla. Dist. Ct. App. 2000); *Crawford v. City of Chicago*, 710 N.E.2d 91, 98 (Ill. App. Ct. 1999); *Tyma v. Montgomery County*, 801 A.2d 148, 158-59 (Md. Ct. App. 2002); *National Pride at Work, Inc. v. Granholm*, No. 05-368-CZ, 2005 WL 3048040 at *4-6 (Mich. Cir. Ct. Sept. 27, 2005) (appeal filed); *Slattery v. City of New York*, 697 N.Y.S.2d 603, 605 (N.Y. App. Div. 1999); *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1243-45 (Pa. 2004); *Heinsma v. City of Vancouver*, 29 P.3d 709, 713 and n.3 (Wash. 2001). In addition, the Attorney General of Kentucky has taken the position that Ky. Const. § 233A, which is identical to Wis. Const. art. XIII, § 13, does not prohibit employers from providing domestic partner benefits. *See Wood v. Commonwealth*, No. Civ.A. 04-CI-01537, 2005 WL 1258921 at *3 (Ky. Cir. Ct. May 26, 2005).

If Wisconsin wanted to invalidate domestic partnerships in its constitution, it could easily have done so by copying the language of Neb. Const. art. I, § 29, which expressly nullifies not only same-sex marriages but also civil unions and domestic partnerships, instead of copying the "substantially similar" language of Ky. Const. § 233A.

Therefore, it can reasonably be inferred from the language of Wis. Const. art. XIII, § 13, which invalidates only a legal status other than marriage that closely corresponds to marriage, that neither the Legislature nor the people intended to invalidate domestic partnerships when they adopted this provision.

This inference is firmly substantiated by the extrinsic materials which illustrate what the people intended when they voted in favor of the referendum presented to them on November 7, 2006.

At the time of the referendum, domestic partner benefits were a growing practice in this country. The number of American companies offering domestic partner benefits grew from less than a hundred a decade ago to more than 7,400 in 2004. WISCONSIN STATE JOURNAL, April 4, 2004, at A1. More than one hundred Wisconsin companies offered domestic partner benefits, including some of the largest and best known employers like American Family Insurance, General Motors, Miller Brewing, Northwestern Mutual Insurance and Oscar Mayer.

MILWAUKEE JOURNAL SENTINEL, February 13, 2005; THE CAPITAL TIMES, March 9, 2004, at A1. Even the corporate paradigm of family values, Walt Disney, was among the five hundred "Fortune 1000" companies that offered its unmarried employees partner benefits. *Crawford*, 710 N.E.2d at 99 (citing NEW YORK TIMES, May 17, 1997). The WISCONSIN STATE JOURNAL article reported that all the major health insurance plans in the Madison area gave companies the option of offering coverage to domestic partners. Thus, domestic partner benefits are rapidly becoming an accepted part of mainstream American life.

The practical importance of domestic partner benefits was made clear by business groups and the Regents of the University of Wisconsin System who publicly opposed the same sex marriage ban amendment because of the possible adverse effect of the "substantially similar" language on economic development. WISCONSIN STATE JOURNAL, October 7, 2006, at B1; WISCONSIN STATE JOURNAL, July 19, 2006, at B1.

The people needed little convincing on this issue, however, for public opinion polls consistently showed that while a majority of the people were opposed to gay marriage, a majority were in favor of legally recognized unions that gave both homosexual and heterosexual partners most of the same benefits as marriage. MILWAUKEE JOURNAL SENTINEL, July 30, 2006; WISCONSIN STATE JOURNAL, July 9, 2006, at A1; THE CAPITAL TIMES, April 14, 2006, at A10; THE CAPITAL TIMES, April 12, 2004, at 3A; THE CAPITAL TIMES, September 19, 2003, at 1A. About the same number of people approved civil unions between heterosexual partners as opposed marriage between homosexual partners. THE CAPITAL TIMES, April 14, 2006, at A10.

Finally, the proponents of the gay marriage amendment, including its chief legislative sponsor, Senator Scott Fitzgerald, and its principal citizen advocate, Julaine Appling of the Coalition for Traditional Marriage, were repeatedly quoted as saying that fears about the amendment's potential effect on domestic partner benefits were overblown, and that the provision would not prohibit employers from offering benefits such as those provided to employees of the cities of Madison and Milwaukee. *E.g.*, MILWAUKEE JOURNAL SENTINEL, July 30, 2006; WISCONSIN STATE JOURNAL, July 19, 2006, at B1; THE CAPITAL TIMES, February 25, 2006, at A1; THE CAPITAL TIMES, December 8, 2005, at 3A; WISCONSIN STATE JOURNAL, March 10, 2004, at B1; WISCONSIN STATE JOURNAL, January 30, 2004, at B1. Indeed, Senator Fitzgerald was reported to have expressly stated that the amendment would not prohibit domestic partner benefits because domestic partnership did not amount to a status similar to marriage. WISCONSIN STATE JOURNAL, December 8, 2005, at A1.

Conversely, while many opponents of the amendment expressed concern that it might adversely affect domestic partner benefits because of its ambiguity, *id.*, it does not appear that anyone actually took a public position that the amendment would outlaw these benefits. One newspaper stated that no one had tried to make a company end domestic partner benefits in any of the nineteen states that have gay marriage bans. MILWAUKEE JOURNAL SENTINEL, October 1, 2006, editorial.

Thus, the people were led to believe that they would not be voting to invalidate domestic partner benefits by voting to invalidate gay marriage.

Since a majority of the people were in favor of domestic partner benefits, and since they were led to believe that they would not be voting against domestic partner benefits if they voted for the gay marriage amendment, it must be concluded that the people did not intend to invalidate domestic partner benefits when they approved Wis. Const. art. XIII, § 13.

Since this provision was approved only months ago, there has not been any legislative action which might shed further light on the intent of the amendment.

Nevertheless, it is quite clear from the plain meaning of Wis. Const. art. XIII, § 13, and from the debates and practices at the time it was adopted, that this provision does not invalidate domestic partner benefits both because domestic partnership is not a legal status substantially similar to marriage and because the people had no intent to invalidate such benefits when they adopted the gay marriage amendment as part of the state constitution.

In closing, it must be stressed that this opinion addresses only the question of whether domestic partner benefits are prohibited under one provision of the state constitution. Nothing in this opinion should be misconstrued to suggest that domestic partner benefits may be required under this or any other provisions of the state or federal constitutions.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

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