WISCONSIN LEGISLATIVE COUNCIL

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

TO: REPRESENTATIVE MARK GUNDRUM

FROM: Don Dyke, Chief of Legal Services

RE: Assembly Joint Resolution __ (LRB-4072/2), Relating to Providing That Only a Marriage Between One Man and One Woman Shall be Valid or Recognized as a Marriage in This State

DATE: January 29, 2004

This is in response to your request for a memorandum discussing how the above-captioned draft joint resolution might be interpreted if made part of the Wisconsin Constitution.

The joint resolution proposes to amend the Wisconsin Constitution by adding the following provision:

> **SECTION 1.** Section 13 of article XIII of the constitution is created to read: [Article XIII] Section 13. 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.

At the outset, it should be noted that the language under discussion, like most constitutional provisions, is relatively general and concise, necessarily making prediction of interpretation somewhat speculative. In addition, there is no legal precedent for interpreting much of the proposed language and, at this point, no legislative history or other evidence of legislative intent. Further, the language has not received widespread public and legal scrutiny. Thus, predicting how a court might interpret the proposed language is at this time basically limited to the language itself, making the discussion even more speculative than it might otherwise be; it is recognized that others might interpret the proposed language differently than the interpretation offered in this memorandum.

It is assumed in the discussion below that reference in the proposed language to "marriage" is to a "civil" marriage.

Marriage

Regarding marriage, the proposed constitutional language provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." It appears reasonable to conclude this language may be interpreted as follows:

1. To be valid under law in this state and recognized at law in this state, a marriage that takes place in this state must be between one man and one woman; a marriage that takes place in this state that does not meet this requirement is not valid under law in this state or recognized at law in this state.

2. A marriage that takes place in another jurisdiction that is not between one man and one woman, even though valid and legally recognized in that jurisdiction, is not valid under law in this state or recognized at law in this state.

3. The state may not by law, and a court may not through judicial interpretation, validate or recognize a marriage that is not between one man and one woman.

Conferring the Legal Status of Marriage on Unmarried Individuals

Concerning the legal status of marriage with respect to unmarried individuals, the proposed constitutional language provides: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." It is assumed for purposes of this memorandum that reference to "legal status of marriage" in the proposed language refers to ***all*** the legal rights, benefits, and obligations conferred and imposed by marriage. Under this assumption, it appears reasonable to conclude this language may be interpreted as follows:

1. The state Legislature and courts may not provide for the establishment of a civil union, or other arrangement, however designated, that confers or purports to confer on unmarried individuals the legal status of marriage or a status substantially similar to that of marriage.

2. If another jurisdiction confers or purports to confer a legal status of marriage or a status substantially similar to that of marriage on unmarried individuals, that status is not valid under law in this state or recognized at law in this state.

Reference to a legal status "substantially similar to that of marriage" is, of course, open to interpretation. It 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.

Conferring a Right or Benefit of Marriage

Regarding conferring a right or benefit of marriage, it appears reasonable to interpret the proposed language as follows:

1. The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits, certain probate rights, or the ability to file joint tax returns.

2. The conferring of a right or benefit traditionally associated with marriage to unmarried individuals in a private setting is not precluded; for example, benefits by a private employer for employees, visitation privileges by a hospital, or family membership status in a health club.

3. The Legislature or a court (or the executive branch) is precluded from extending the rights and benefits of marriage to unmarried individuals to the extent those rights and benefits confer a legal status identical to that of marriage or substantially similar to that of marriage.

It is assumed that "recognition" of a domestic arrangement, by whatever designation, of unmarried individuals by a political subdivision or local governmental unit can never reach the level of conferring a legal status identical to or substantially similar to that of marriage. Political subdivisions and local governmental units lack legal authority to do so. The same assumption applies to recognition of such arrangements in a private setting. Thus, while at the local level or in a private setting such arrangements may be recognized, they are so recognized only for relatively limited purposes and not on a basis that confers a legal status identical to or substantially similar to that of marriage. Under these assumptions, recognition of domestic arrangements at the local level and in the private sector is not prohibited by the proposal.[*] However, it is conceded that formal recognition at the local level or in the private sector of a marriage or other domestic arrangement, valid in another jurisdiction, that under the proposed language is not valid or recognized in this state, may be prohibited by the language of the amendment. Nonetheless, rights or benefits traditionally associated with marriage arguably may still be conferred in those situations on some other basis, as defined at the local or private level.

However, as noted, the Legislature or a court (or the executive branch) is precluded by the proposed language from extending the rights and benefits of marriage to unmarried individuals to the extent those rights and benefits confer a legal status identical to that of marriage or substantially similar to that of marriage. Conversely, the Legislature is free to confer rights and benefits of marriage to unmarried individuals as long as those rights and privileges do not reach the level of the legal status of marriage or a legal status substantially similar to that of marriage. It is less clear whether, by conferring various rights and benefits of marriage piecemeal over time, the Legislature may under the language

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[*] Under this interpretation, it appears, for example, that the following arguably would be unaffected by the proposed amendment:

1. The City of Milwaukee's Domestic Partner Registration under ch. 111 of the Milwaukee Code of Ordinances.

2. The City of Madison's Domestic Partner Registration under s. 3.23 (11), Madison Code of Ordinances, including related provisions such as prohibited discrimination (s. 3.23 (5) (a) and (b)), health insurance (ss. 3.38 (26) and 3.52 (1) (h) 1.), and definitions for purposes of ethics and lobbying regulation (ss. 2.40 (2) and 3.47 (2) (d) and (f)).

3. The conferring of health benefits to designated family partners by the Madison Metropolitan School District pursuant to its collective bargaining agreement with Madison teachers.

effectively confer the legal status of marriage or a status substantially similar to marriage on unmarried individuals. Arguably, under the proposed language, the Legislature would be precluded from granting rights and privileges to unmarried individuals in the future if doing so will result in unmarried individuals obtaining, in the aggregate, a legal status substantially similar to that of marriage. At what point this preclusive effect would occur would likely need to be determined by the courts.

This is an initial, general response to your request. Elaboration and expansion may be possible after legislative intent and public reaction are available.

In the meantime, if you have any questions or need additional information, please contact me directly at the Legislative Council staff offices.

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