WISCONSIN LEGISLATIVE COUNCIL

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

TO: REPRESENTATIVE MARK GUNDRUM

FROM: Don Dyke, Chief of Legal Services

RE: 2005 Assembly Joint Resolution 67 (Marriage Amendment)

DATE: February 24, 2006

You have requested comment in response to certain concerns raised about the possible effect of 2005 Assembly Joint Resolution 67[1].

In particular, those concerns raise questions about the legal ramifications to unmarried persons of the language of 2005 Assembly Joint Resolution 67. That resolution is a proposed constitutional amendment, approved by both the Assembly and the Senate on first consideration during the 2003-04 Legislative Session,[2] that would provide that only a marriage between a man and a woman would be recognized or valid in this state. In addition, the proposed amendment would provide that a legal status identical or substantially similar to that of marriage for unmarried individuals would not be valid or recognized in this state. Specifically, the amendment would add the following language to the state constitution:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

As noted, the constitutional amendment proposed by Assembly Joint Resolution 67 passed both houses of the Legislature last session. The proposed amendment must pass in identical form this session before it can be submitted to the voters at a statewide referendum. If the voters approve the amendment, it would become part of the state constitution.

---

[1] This memorandum is based on the substantial contribution of Robert J. Conlin, a former Senior Staff Attorney with the Legislative Council staff.

[2] The Senate companion to Assembly Joint Resolution 67, 2005 Senate Joint Resolution 53, has been approved by the Senate in this legislative session.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

The concerns about the effect of Assembly Joint Resolution 67 addressed by this memorandum appear to arise from concern that the second sentence may be interpreted to preclude an unmarried individual from using certain existing laws and practices to protect and manage his or her financial, property, or other transactions and relationships.

This memorandum attempts to help you better understand how a court might interpret the second sentence of the amendment. At the outset, though, it is noted that it is always difficult to predict how a court may ultimately interpret a constitutional provision. In addition, as noted above, the debate over the proposed amendment is not yet over and the measure is not yet a part of the constitution. Further, if the amendment passes on second consideration, the Attorney General will be expected to provide an official explanatory statement of the effect of either a "yes" or "no" vote on the measure. However, this memorandum will apply generally recognized principles of constitutional interpretation in order to give you a clearer picture of how a court may interpret the second sentence of the proposed amendment.

This memorandum suggests that a court could reasonably conclude that the second sentence of 2005 Assembly Joint Resolution 67 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status which is the same as, or is nearly the same as, marriage. Further, no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving individual benefits or protections or utilizing the law in such a way as to allow them to privately order their lives even though such benefits or use of the laws may result in the unmarried individuals sharing in benefits or protections that also happen to be offered to married persons.

Background

To better understand the intent of Assembly Joint Resolution 67, it is necessary to understand the historical context into which the proposal was introduced on first consideration. In the early to mid-1990's, the Hawaiian courts were called upon to determine whether that state could constitutionally deny marriage licenses to persons of the same sex. [See, for example, *Baehr v. Lewin*, 74 Haw. 530 (1993).] Many believed that, at the time, Hawaii would be the first American state to recognize marriages between persons of the same sex.[3] Accordingly, states around the country, including Wisconsin, began to examine their marriage laws with respect to whether those laws permitted or authorized marriages between persons of the same sex and whether those laws would require the recognition of same-sex marriages performed in other states. At the time, the laws of many states, including Wisconsin, generally required the recognition of valid marriages performed in other states unless such marriage was contrary to the laws or public policy of the state. (Wisconsin's law has remained unchanged.) Additionally, the Full Faith and Credit Clause of the U.S. Constitution generally requires a state to recognize various official acts of other states. It was felt by some that those state laws and the U.S. Constitution might require states to recognize a marriage between persons of the same sex that was performed in another state unless state laws clearly prohibited such marriages.

In March of 1996, with about one month left in the legislative session, State Representative Lorraine Seratti introduced 1995 Assembly Bill 1042, relating to prohibiting marriage between persons

---

[3] Hawaii ultimately amended its constitution in 1998 to prohibit marriages between persons of the same sex.

of the same sex. It appears that this was the first bill introduced in Wisconsin to prohibit such marriages. That bill did not have a public hearing and failed to pass in the 1995-96 Legislative Session due to the ending of the session.

In September of 1996, Congress passed, and the President signed, the federal Defense of Marriage Act. [P.L. 104-199.] The Act defines "marriage," for the purposes of various federal benefits and other programs, to mean a legal union only between one man and one woman as husband and wife. In addition, the Act defines "spouse" as a person of the opposite sex who is a husband or wife. Additionally, the Act provides that no state or territory of the United States is required to give effect to any public act, record, or judicial proceeding of any other state or territory respecting a relationship between persons of the same sex that is treated as a marriage under the laws of that state or territory, or a claim arising from such relationships.

In February of 1997, Representative Seratti reintroduced her bill from the previous session as 1997 Assembly Bill 104. The bill was the subject of considerable debate and public attention. It had a public hearing in March of 1997 and passed the full Assembly in May of that year. A public hearing was held on the bill in March of 1998 in the Senate, but the bill failed to pass due to the end of the legislative session.

In each legislative session since, legislation addressing the subject of marriage between persons of the same sex has been introduced but not enacted. [See, e.g., 1999 Assembly Bill 781 and Senate Bill 401, 2001 Assembly Bill 753, 2003 Assembly Bill 475 and Senate Bill 233.] 2003 Assembly Bill 475, the last of these bills to receive any legislative attention, passed both houses of the Legislature but was vetoed by the Governor in November of 2003. A veto override attempt was unsuccessful. Subsequently, 2003 Assembly Joint Resolution 66 was introduced and passed both houses of the Legislature on first consideration in the Spring of 2004.

The national debate on this issue was heightened during the above-described period by a number of legal decisions around the country. Two decisions are perhaps the most relevant to this memorandum. In 1999, the Vermont Supreme Court, in *Baker v. State of Vermont*, 744 A.2d 864 (1999), ruled that Vermont's exclusion of same-sex couples from the benefits of marriage violated Vermont's constitutional "Common Benefits Clause." The court concluded that same-sex couples were entitled to the same benefits and protections afforded by Vermont law to heterosexual marriages. After this decision, the Vermont Legislature enacted Vermont's Civil Union Law, which established a procedure for persons of the same sex to enter into a civil union in the State of Vermont. The purpose of the Civil Union Law was to provide eligible same-sex couples the opportunity to "obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." [See 2000 Vermont Laws 91.] The Civil Union Law specifically provides that "Parties to a civil union shall have the same benefits, protections and responsibilities under law…as are granted to spouses in a marriage." [See s. 1204 (a) of 15 VSA ch. 23.]

In November of 2003, shortly after 2003 Assembly Bill 475 failed in Wisconsin, the Massachusetts Supreme Judicial Court, in *Goodridge, et al. v. Department of Public Health,* 440 Mass. 309; 798 N.E.2d 941 (2003), struck down, on state constitutional grounds, Massachusetts' prohibition on marriage between persons of the same sex, opening the way for couples of the same sex to be married in Massachusetts. Subsequently, the Massachusetts Legislature sought an opinion from the court as to whether a proposed bill creating "civil union" status, similar to Vermont's Civil Union Law, would pass

constitutional muster in light of the court's decision in *Goodridge*. Significantly, the proposed law would have provided that "A civil union shall provide those joined in it with a legal status equivalent to marriage and shall be treated under law as a marriage. All laws applicable to marriage shall also apply to civil unions." [See Mass. Senate No. 2175.] In February of 2004, the court responded and concluded that the "civil union" bill would not satisfy the state's constitution and would, if enacted, be found unconstitutional. [See *Opinions of the Justices to the Senate*, SJC-09163 (February 3, 2004).] Since May of 2004, same-sex couples may legally marry in Massachusetts.

These and other developments have sparked considerable legislative activity across the country. From 1996 to 2004, many other states made statutory changes, constitutional changes, or both, to prohibit the recognition of marriages between persons of the same sex.

DISCUSSION – COURT INTERPRETATION OF THE LANGUAGE IN QUESTION

As noted above, concern has been raised regarding the breadth and vagueness of the second sentence of the proposed constitutional amendment. Thus, a court may be required to interpret its meaning. For Wisconsin courts, 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*, 264 Wis. 2d 520, 665 N.W.2d 328, 333 (2003), quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).] Wisconsin courts turn to three sources to aid in determining the meaning of a constitutional provision: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the Legislature as manifested in the first law passed following adoption of the provision. [*Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123, 127 (1996).] The remainder of this memorandum discusses the proposed amendment in a manner consistent with these interpretive principles to assist you in better understanding how the amendment may be interpreted. However, as the proposed amendment has not been adopted, resort to the third tool in determining constitutional intent--the examination of any implementing legislation--is not possible.

Again, the second sentence of the proposed amendment provides as follows:

> A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

The Context

The gist of the concern over the above sentence appears to be the perceived breadth and vagueness of the phrase "legal status identical or substantially similar to that of marriage." It is true that the proposal does not define this phrase. When the phrase is considered in isolation, one might conclude that the phrase is referring to any legal status akin to the status enjoyed by a married couple. However, the intent of a constitutional provision is to be "ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole" through recognition of the reasons which led to the framing and adopting of the amendment. Once that intent is ascertained, "no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion." [*Thompson v. Craney*, 546 N.W.2d at 131, citations omitted.] Courts may review the general history relating to a constitutional amendment as well as the legislative history of the amendment. [*Schilling v. Wisconsin Crime Victims Rights Board*, 2005 WI 17, 278 Wis.

2d 216, 692 N.W.2d 623 (2005).] The foregoing history concerning same-sex marriages, then, is important for gaining an understanding of how a court may interpret the proposed amendment should it be adopted and approved.

As noted, at the time of the introduction of the amendment, Vermont had enacted, and Massachusetts was considering enacting, a "civil union" law granting to couples of the same sex the opportunity to enter into a state-sanctioned relationship conferring "the same benefits, protections and responsibilities" granted to married couples or extending to those in a civil union "a legal status equivalent to marriage." While 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 you as the amendment's primary author, seeking co-sponsors of the proposed amendment on first consideration. In it, you explain that the proposal would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." You also noted:

> In addition, the proposal states that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid in this state, regardless of what creative term is used--civil union, civil compact, state sanctioned covenant, whatever. Marriage is more than just the particular eight letters used to describe it--it is a fundamental institution for our society, regardless of the particular term used to describe it.

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

It appears, then, that the primary author of the proposed amendment 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. But is this expressed intent born out by the language of the second sentence of the amendment? A review of the relevant language is in order.

<u>The Language</u>

An understanding of the meaning of the second sentence of the proposed amendment includes an examination of the plain meaning of the words in the context used. To understand what is meant by a "legal status identical or substantially similar" to that of marriage, it seems reasonable to first understand the legal status of a civil marriage. In Wisconsin, a marriage, so far as its validity at law is concerned, is a civil contract that creates the legal status of husband and wife. [s. 765.01, Stats.] It is a legal relationship in which a husband and wife owe to each other mutual responsibility and support and 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 or maintenance of his or her minor children and of the other spouse. [s. 765.001, Stats.] Because the law recognizes the importance of marriage as the institution that is the "foundation of the family and of society," the consequences of marriage are important not just to the parties entering into marriage, but all of society. Thus, the state has an interest in seeing marriages succeed. [See s. 765.001 (2), Stats.] It is for this reason that it is often said that

there are three parties to a marriage contract--the husband, the wife, and the state. Similarly, it has been said that "the marriage contract, once entered into, becomes a relation, rather than a contract, and invests each party with a status toward the other, and society at large, involving duties and responsibilities which are no longer matter for private regulation but concern the commonwealth." [*Fricke v. Fricke*, 42 N.W.2d 500, 501, 502 (1950), internal citations omitted.] Arguably, this is part of the "legal status" of marriage in Wisconsin.

Aside from the obligations imposed upon parties to a marriage, states and the federal government, recognizing the importance and significance of marriage in society, have enacted laws which confer various rights and benefits upon married persons that are not typically automatically conferred on unmarried individuals. These rights and benefits are numerous. In 1997, for example, the U.S. General Accounting Office (GAO) identified over 1,000 federal laws in which marital status is a factor. Those laws identified by the GAO included tax laws, federal financial aid and benefits, immigration and naturalization laws, and many others. Wisconsin also has numerous laws that confer rights and benefits on married individuals such as tax laws, credit laws, probate, estate and inheritance laws, and various legal privileges and immunities. Accordingly, one might conclude that this bundle of rights and benefits conferred by law upon married persons is a necessary component of the "legal status" of marriage.

Many of these statutory rights and benefits, while automatically conferred on married persons, are not exclusive to marriage and can be completely or nearly replicated for unmarried individuals. For example, unmarried individuals may hold property jointly as joint tenants, which generally confers survivorship rights in the other joint tenant. They may create a joint tenancy by expressing an intent to do so. [See s. 700.19 (1), Stats.] A married couple, in comparison, if identified as husband and wife in the title to property, automatically holds property jointly, with survivorship rights, unless they express a different intention. [See s. 700.19 (2), Stats.] Thus, an unmarried couple can create a right of survivorship similar to that enjoyed by a married couple. Other examples of laws that authorize unmarried persons to claim rights and benefits similar to those conferred automatically upon married couples include inheritance rights via a will, health care decision-making via a durable power of attorney for health care, tax advantages through the use of trusts, and protections against domestic abuse. Private parties (and governmental units) can also assist unmarried individuals to enjoy rights or benefits similar to the rights and benefits traditionally afforded to married couples, or families. For example, an employer can choose to extend family status to unmarried persons for purposes of health care benefits. Similarly, a health club could extend family membership benefits to unmarried persons.

The concerns raised with Assembly Joint Resolution 67 seem to suggest that the validity of many of the tools used by unmarried individuals to secure rights and benefits that approximate those enjoyed by married couples might be called into question under the proposed amendment because they allow unmarried individuals to exercise rights and benefits substantially similar to the rights and benefits enjoyed by married persons. As previously mentioned, though, the proposed amendment addresses a "legal status," or standing in law, identical or substantially similar to that of marriage. "Identical," of course, means "exactly the same for all practical purposes" [Black's Law Dictionary], "being the same, having complete identity," "characterized by such entire agreement in qualities and attributes that identity may be assumed," or "very similar, having such close resemblance and such minor difference as to be essentially the same." [Webster's Third New International Dictionary.]

"Similar" is defined as "having characteristics in common, very much alike, comparable," "alike in substance or essentials," or "one that resembles another, counterpart" [Webster's Third New International Dictionary], or "nearly corresponding, resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference." [Black's Law Dictionary.] "Substantially" is defined as meaning "essentially; without material qualification." [Black's Law Dictionary.] Thus, something can be said to be "substantially similar" if it is essentially alike something else.

It does not seem reasonable to conclude that two unmarried individuals who title property as joint tenants or make health care decisions for each other under a durable power of attorney for health care, or who are offered family health insurance by an employer, have a legal status identical or substantially similar to that of husband and wife. Two brothers who own property jointly cannot be said to owe each other mutual responsibility and support as do a husband and wife or possess the rights and benefits of marriage simply because they own property together. Similarly, a person who is given the power via a durable power of attorney for health care to make medical decisions for an elderly neighbor cannot be said to have evolved a standing in the eyes of the law essentially like the legal status of husband and wife simply because husbands and wives can make the same sorts of decisions for each other. Finally, when an employer grants family health care benefits to unmarried individuals, it undoubtedly confers a benefit on the unmarried individual, and that benefit may be identical to the benefit provided to a married employee, but it seems unreasonable to conclude that the unmarried individual has been conferred a legal status substantially similar to marriage. In all of these cases, the unmarried person's legal status with respect *to the right or benefit sought* may be said to be identical or substantially similar to the legal status that a married person might have with regard to the same right or benefit, but that is not to say that the legal status is identical or substantially similar to *marriage*.

If a court adopted an interpretation of the amendment which would invalidate a legal right or benefit between unmarried persons merely because the right or benefit is identical or substantially similar to a right or benefit afforded to married couples, the result would be the invalidation of countless legal relationships in the state between numerous "unmarried individuals." It does not appear that there is any legislative history to support such intent. Moreover, had the Legislature intended such a result, it could have done so more simply by prohibiting unmarried individuals, or unmarried individuals of the same sex, from contracting for a right or benefit enjoyed by married couples or prohibiting the public or private conferring of such rights or benefits on unmarried individuals. It did not do this, though. Instead, it prohibited the recognition of a "legal status" identical or substantially similar to that of *marriage* between unmarried individuals. As suggested above, for a legal status to be identical or substantially similar to a marriage, it can be reasonably argued that the parties to such status must owe to each other some level of mutual responsibility and support and enjoy the rights and benefits conferred by law based upon the status of marriage. Their status under the law must rise above that of merely parties to a legal contract. A relation must result, one that is exactly the same as or nearly the same as the legal relation resulting from marriage. Accordingly, based upon the language chosen by the Legislature, a court could reasonably conclude that the proposed constitutional amendment is not intended to prohibit the recognition of private legal arrangements simply because those arrangements result in the parties enjoying a right or benefit that is the same as or similar to a right or benefit to which married couples have access.

The Expressed Intent

The above conclusion is further buttressed by the expressed intent of the primary author of the amendment. The co-sponsorship memo from you, referred to above, explains that the proposal:

> …does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As long as the legal construct designed by the state does not rise to the level of creating a legal status 'identical or substantially similar' to that of marriage (i.e., marriage, but by a different name), no particular privileges or benefits would be prohibited.

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

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

In a similar vein, a Legislative Council staff memorandum to you dated January 29, 2004, discussed how the courts might interpret the proposed amendment.[4] The Legislative Council memorandum pointed out that it was reasonable to interpret the second sentence of the amendment as follows:

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

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

- The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a

---

[4] It is noted that you referred to this memorandum in your co-sponsorship memorandum.

right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits, certain probate rights, or the ability to file joint tax returns.

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

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

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

While 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 as or nearly the same as marriage in Wisconsin.[5] Similarly, the above expressions of intent also appear to directly refute the notion that the authors of the amendment intend to eliminate the ability of unmarried individuals to arrange their private affairs in ways that may happen to approximate legal rights or benefits extended to married persons.

The Presumption of Constitutionality

Finally, it is noted that laws enacted by the Legislature are presumed by the courts to be constitutional and a person challenging the constitutionality of a statute must show that the statute is unconstitutional beyond a reasonable doubt. Where any doubt exists as to a law's unconstitutionality, it must be resolved in favor of constitutionality. [See, e.g., *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).] This presumption applies regardless of whether the

[5] It may be of interest to note that two bills introduced at the end of the 2003-04 Legislative Session and a bill introduced in the current session may have been affected by the proposed amendment had the bills and amendment become law. 2003 Assembly Bill 955 created a legally recognized relationship of domestic partnership. 2003 Assembly Bill 992 authorized marriage between persons of the same sex. 2005 Assembly Bill 824 (Senate Bill 397) creates a legally recognized relationship of domestic partnership.

statute was enacted before or after enactment of a constitutional amendment. [*State v. Cole*, 264 Wis. 2d 520, 665 N.W.2d 328, 335-336 (2003).] Thus, a party arguing the invalidity of a right or benefit that unmarried individuals may avail themselves of under law that is similar to a right or benefit conferred on married couples would be required to show beyond a reasonable doubt that the law upon which the right or benefit is based violates the proposed amendment. The historical context, the plain language, and the expressed intent of the primary author would, it seems, make it difficult for a challenger to overcome the strong presumption of constitutionality that such laws would enjoy.

Conclusion

The above analysis suggests that a court could reasonably conclude that the second sentence of 2005 Assembly Joint Resolution 67 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status which is the same as, or is nearly the same as, marriage. Further, no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving benefits or utilizing the law in such a way as to allow them to privately order their lives even though such benefits or use of the laws may result in the unmarried individuals sharing in benefits or protections that also happen to be offered to married persons.

The concerns raised cannot be entirely laid aside, however. Parties might raise claims in a court or elsewhere that may, at least temporarily, cast doubt on the validity of benefits and other legal rights that unmarried persons seek to avail themselves of. In addition, while this memorandum has suggested that a legal status identical or substantially similar to marriage would need to encompass some level of mutual obligation and support, it is conceivable that a court could construe the accumulation by unmarried individuals of a number of rights and benefits that married persons enjoy as a "legal status identical or substantially similar to marriage." Consequently, although this memorandum has attempted to offer a reasonable, and perhaps likely, interpretation of the proposed amendment, it cannot be concluded with certainty that a court will draw the same conclusions about the intent of the proposed amendment should it pass this session of the Legislature and be ratified by the people.

Some uncertainty is inherent in attempting to determine how a court will interpret a constitutional amendment. The foregoing is one attempt to do so, but it is likely that final resolution of this matter will ultimately fall to the courts if the proposed amendment is enacted.

Should you have any questions regarding this memorandum, please contact me at the Legislative Council staff offices.

DD:jal:tlu:rv:ksm