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**STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV
CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Case No. 11 AP 1572
Dane County Case No. 10 CV 4434**

**JULAIN K. APPLING, JO EGELHOFF, JAREN E. HILLER,
RICHARD KESSENICH AND EDMUND L. WEBSTER,
Plaintiffs-Appellants-Cross-Respondents,**

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-Cross-Appellants.**

**ON APPEAL FROM AN ORDER FOR SUMMARY JUDGMENT
IN FAVOR OF DEFENDANTS, DATED JUNE 20, 2011, ENTERED
IN THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE DANIEL MOESER, PRESIDING**

**AMICUS BRIEF AND APPENDIX OF DANE COUNTY,
IN SUPPORT OF DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS**

**Marcia MacKenzie, State Bar No. 1020725
Corporation Counsel
Dyann L. Hafner, State Bar No. 1009541
Assistant Corporation Counsel
Office of the Dane County Corporation Counsel
210 Martin Luther King, Jr. Blvd., Room 419
Madison, Wisconsin 53703
(608) 266-4355**

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STATEMENT OF FACTS

August 1, 2009, Chapter 770 of the Wisconsin Statutes went into effect creating for the first time a unified, statewide system for registration of domestic partnership. Plaintiffs-Appellants challenge Chapter 770 as unconstitutional under Article XIII, Section 13 of the Wisconsin Constitution, also known 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.”

Dane County maintains a domestic registry for heterosexual domestic partners,¹ “to provide domestic partners of the opposite sex with a centralized repository for filing of a Declaration of Domestic Partnership for the sole purpose of qualifying for employer-provided benefits for a domestic partner.” Prior to the enactment of Chapter 770, Stats., Dane County’s domestic registry included registration of homosexual domestic partnerships.

ARGUMENT

I. THE DANE COUNTY CIRCUIT COURT WAS CORRECT WHEN IT CONCLUDED THAT CHAPTER 770 OF THE WISCONSIN STATUTES DOES NOT VIOLATE THE MARRIAGE AMENDMENT.

A. Plaintiffs-Appellants Failed To Prove That Chapter 770, Stats., Is Unconstitutional Beyond A Reasonable Doubt.

In order to overcome the strong presumption of constitutionality, the contesting party must prove that the offending statutes unconstitutional beyond a reasonable doubt. “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). Plaintiffs-Appellants failed to prove Chapter 770, Stats., unconstitutional beyond a reasonable doubt.

When interpreting a constitutional amendment, the court must give effect to the intent of the framers and of the people who adopted the amendment. *State v. Cole*, 2003 WI

¹ Sec. 60.01, Dane County Code of Ordinances.

112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328. To determine the meaning of a constitutional provision, the court examines the following three primary sources: (1) the plain meaning of the provision; (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. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 28, 719 N.W.2d 408.

B. The Trial Court Correctly Concluded That By Its Plain Meaning, The Constitutional Debates And Practices Of The Time, And The Earliest Interpretations Of The Provision By The Legislature, The Marriage Amendment Does Not Proscribe Domestic Partnerships Pursuant To Chapter 770 Of The Wisconsin Statutes.

1. *The trial court correctly discerned the plain meaning of the Marriage Amendment.*

That Amendment reads 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, Section 13, Wis. Const. The Amendment has two components, the first sentence, which recognizes and limits marriage to only between one man and one woman, and the second sentence which gives effect to the first 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.’” *McConkey v. Van Hollen*, 2010 WI 57, ¶ 54, 326 Wis. 2d 1, 783 N.W.2d 855.

The trial court defined “marriage” by reference to section 765.01, Stats. Marriage is a legal relationship between two equal persons, a husband and wife, who owe to each other mutual responsibility and support and who owe to minor children of the union an equal duty of support. Sec. 765.001(2), Stats.

The trial court correctly determined the boundaries of the definitions of “legal status” by eliminating from consideration all non-legal statuses, such as whether a registered domestic partnership is socially considered to be an

alternative to marriage. The court correctly defined the phrase “substantially similar” to mean essentially alike, though not identical.

2. *The trial court correctly concluded that the constitutional debates as to what the proponents of the Marriage Amendment sought to accomplish support the constitutionality of Chapter 770, Stats.*

The trial court decision describes the facts and circumstances surrounding the passage of the Marriage Amendment. (App., pp. 112-127) Accordingly, the record will not be discussed here. What the record in the trial court makes clear is that at the time of its adoption, the intent of the framers of the Marriage Amendment was to preserve an ability for the legislature to create some type of legal status for same sex couples providing some of the rights enjoyed by married people. (App., pp. 117-121)

3. *The earliest interpretation of the Marriage Amendment by the legislature was the creation of the domestic registry.*

The legislature declared that Chapter 770, Stats., is to be construed to be consistent with Article XIII, Section 13 of

the Wisconsin Constitution and that the legal status of domestic partnership created under Chapter 770 is not substantially similar to that of marriage.² Therefore, the first legislative declaration following the enactment of the Marriage Amendment was a protective legal status for same sex couples, demonstrating legislative interpretation of the amendment that such legally protected status was constitutional.

4. *The statutory partnership status created in Chapter 770, Stats., is substantially inferior to the legal status of marriage.*

Plaintiffs-Appellants argue that the relevant points of comparison demonstrate that the legal status of domestic partnership is substantially similar to the legal status of marriage. Rather, the relevant points of comparison demonstrate exactly the opposite.

Under section 765.001(2), Stats., the legislature states that marriage is the foundation of the family and society, and its stability is considered basic to morality and civilization.

² Sec. 770.001, Stats.

The termination of a marriage is considered to result in injury to the public. The legislature considers the seriousness of marriage such to warrant pre-marital counseling and the termination of marriage to warrant protections of divorce proceedings. The legislature declares that in a marital relationship, each spouse owes the other and children of the marriage adequate support and maintenance. Registered domestic partnerships are not similarly recognized or valued; nor does the state consider the stability of such relationships important to the public interest.

- *Registered domestic partners are not entitled to jointly parent children.*

Registered domestic partnerships are not considered the foundation of the family. Wisconsin law does not recognize domestic partners as parents to the children of such relationships in any way similar to the recognition given to married partners. While a domestic partner is recognized as the single parent of his or her own offspring, a domestic partner may not under any circumstances adopt the child of his or her domestic partner in order to become that child's

other parent. Secs. 48.81(4) and 48.82(1), Stats.; *In Interest of Angel Lace M.*, 184 Wis. 2d 492, 507-508, 516 N.W.2d 678 (1994). Also, while a married spouse is presumed to be the parent of a child born to the marriage, a registered domestic partner is not presumed to be the parent of a child born to the other domestic partner. See secs. 891.39(1) and 891.41(1), Stats.

- *A non-parent registered domestic partner may become a guardian to the other partner's children, but the status of guardian is inferior to the status of parent.*

While domestic partners may live together for purposes that may include raising children collectively, the best that domestic partners can do to simulate a parent-type relationship for the non-parent partner. However, while guardianship imposes significant duties on the legal guardian of a child, those duties are not recognized as equal to the duties of a parent. *Conant v. Physicians Plus Medical Group, Inc.*, 229 Wis. 2d 271, 279, 600 N.W.2d 21 (Ct. App. 1999). For example, parents can maintain a separate loss of companionship claim in a tort action involving death or injury

to the parent's child. A guardian of the child cannot. *Id.* 229 Wis. 2d 271, 276. In addition, the 'non-parent' domestic partner's ability to establish guardianship depends entirely on the consent of the parent domestic partner. *See In the Matter of the Guardianship of O.G. M.-K.*, 2010 WI App 90, 327 Wis. 2d 749, 787 N.W.2d 848. A parent cannot terminate the child's relationship with the other parent unless grounds for termination of parental rights are proven, but a parent can terminate the child's relationship with the child's guardian unless there exists extraordinary circumstances affecting the health or safety of the child. *In the Matter of the Guardianship of James D.K.*, 2006 WI 68, ¶3, 291 Wis. 2d 333, 718 N.W.2d 38. Accordingly, the status of domestic partnership is substantially inferior to the status of marriage with regard to the rights to care for and maintain relationships with children of the partnership who are not offspring of the domestic partner.

- *Domestic partners must prove mutual commitment in order to register that marital partners do not have to prove prior to marriage.*

Domestic partners must share a common residence in order to prove the commitment necessary to be worthy of the protections provided in Chapter 770, Stats.³ Married partners, by comparison, do not have to share a common residence in order to prove that they are entitled to the rights, privileges and protections of marriage. Further, the ability to register a domestic partnership is limited to the county of that common residence.⁴ Engaged couples may marry anywhere and have their status as legally married universally recognized.

- *Registered domestic partners receive inferior tax treatment to marital partners.*

The commitment of domestic partners to each other entitles them to no special treatment for tax purposes. Registered domestic partners may not file taxes jointly as married people can, nor share deductions available to only one of the partners. Registered domestic partners may not obtain the married person's tax credit under section 71.07(6),

³ Sec. 770.05(3), Stats.

Stats. For tax purposes, the relationship of domestic partnership is substantially inferior to the relationship of marriage.

- *Wisconsin law is indifferent to the stability of domestic partnerships.*

Wisconsin law does not encourage the stability of registered domestic partnership as it does for marriage. Couples wishing to end a marriage must obtain court permission by filing for divorce. Protections for married spouses provided in divorce actions include court ordered spousal and child support. Child support agencies are maintained in every county to ensure that children are financially supported by both of their parents. By contrast, a domestic partnership and all of its benefits may terminate unilaterally, by one of the domestic partners filing a notice of termination or by getting married. A dependant domestic partner whose domestic partnership has been terminated is without remedy and cannot expect to receive even temporary continued support. Marital property protections under

⁴ Sec. 770.07(1), Stats.

Chapter 766, Stats., do not apply. Property acquired during the registered domestic relationship to one partner stays with that partner upon termination of the domestic partnership. Children of the relationship may only look to his or her parent for financial support. The domestic partnership registry provides substantially inferior protections to ex-domestic partners compared to the protections provided to ex-spouses after termination of their marriage.

- *Registered domestic partners of Wisconsin veterans go unrecognized.*

A domestic partnership will not be recognized as a relationship of any particular significance under Wisconsin's veteran assistance statutes. A surviving domestic partner is not entitled to veterans housing loans under section 45.37(2), Stats., or personal loans under section 45.42(2), Stats. In death, unlike married spouses, a domestic partner cannot be buried along side his or her veteran partner in Wisconsin veteran's cemeteries.⁵

⁵ Sec. 45.61(2), Stats.

- *Registered domestic partnerships are not recognized for Medical Assistance eligibility.*

If one of the registered domestic partners should need Medical Assistance, eligibility criteria fails to take into consideration the domestic relationship in any respect. There is no recognition that the partners owe any duty of support to each other. A dependent domestic partner is not provided a support allowance the way a ‘community spouse’ is pursuant to section 49.455(4), Stats. There are no spousal impoverishment protections for assets accumulated jointly by domestic partners, most notably protecting the home the partners live in. Transfers of assets may not be made to a ‘community registered domestic partner’ as they can to a ‘community spouse.’⁶ The state may impose a lien for Medical Assistance provided on the recipient’s home, unless the recipient’s spouse resides in the home.⁷ No such protection is available to the registered domestic partner.

⁶ Sec. 49.455(6), Stats.

⁷ Sec. 49.496, Stats.

In summary, even with the benefits provided to registered domestic partners under Chapter 770, Stats., the registered domestic partnership status falls significantly short of the protections provided married spouses. So much so that registered domestic partnership could not reasonably be said to be substantially similar to marriage so as to run afoul of Article XIII, Section 13 of the Wisconsin Constitution.

II. BY ENACTING A SYSTEM OF DOMESTIC PARTNERSHIPS UNDER CHAPTER 770 OF THE WISCONSIN STATUTES, THE STATE ACTED WITHIN THE SCOPE OF ITS TRADITIONAL POLICE POWERS TO PROVIDE FOR THE GENERAL WELFARE OF ITS CITIZENS, WELL WITHIN THE BOUNDARIES OF THE MARRIAGE AMENDMENT.

A. The Legislature Acted Within The Scope Of Its Police Powers In Enacting Chapter 770 Of The Wisconsin Statutes.

The Legislature has plenary power to act except where forbidden by the Wisconsin Constitution. The preamble of the Wisconsin Constitution provides that one of the main purposes in establishing our state government is to promote the general welfare. The object of the state's police powers is

securing the general welfare, comfort and convenience of the people. The state's police powers are inherent and only limited by the constitution. *Town of Beloit v. County of Rock*, 2003 WI 8, ¶23, 259 Wis. 2d 37, 657 N.W.2d 344.

B. Chapter 770, Stats., Promotes The General Welfare Of Registered Domestic Partners And Their Families.

Chapter 770 recognizes the reality that homosexual couples, with or without a domestic registry, legally share common households for purposes of mutual love and affection, for purposes of sharing limited and finite resources and for purposes of raising children. In recognition of this fact, the benefits provided by the domestic registry assist the couples in supporting each other and their children, in times of ill health and economic adversity.

Under section 103.10, Stats., a registered domestic partner can obtain family or medical leave from employment to take care of his or her sick partner. Under section 50.06, Stats., a registered domestic partner may admit his or her incapacitated partner from a hospital to a nursing home for

follow up or long term care. A registered domestic partner may also admit his or her incapacitated partner to hospice care. Sec. 50.94, Stats. A registered domestic partner who is directly involved in providing care to his or her partner may have access to treatment records to assist in the provision of care. Sec. 51.30(4)(b)20, Stats. Registered domestic partners are entitled to visit each other if one is in a care facility. Secs. 50.034(3)(e), 50.035(2d), 50.04(2d), 50.09(1)(f)1, 50.36(3j), and 50.942, Stats. The recognition given to registered domestic partners makes it easier for domestic partners to care for each other.

The recent legal benefits provided to registered domestic partners also helps to prevent members in registered domestic partnership households from becoming impoverished after the death of one of the domestic partners. Remaining unpaid wages may be paid upon demand to the surviving registered domestic partner.⁸ Title to the family car may be passed to the surviving registered partner following

⁸ Sec. 109.03(3), Stats.

the death of the other.⁹ A surviving registered domestic partner may also elect to keep the home and household furnishings from the deceased partner's estate, unless the home has been specifically bequeathed to someone else.¹⁰ A surviving registered domestic partner may also petition the court for a support allowance from the deceased partner's estate.¹¹

These recent changes in law resulting from Chapter 770, Stats., benefit those living in families headed by domestic partners by enabling the partners to care for their families in times of economic uncertainty, disability and death.

C. Chapter 770, Stats., Promotes The General Welfare Of Citizen Taxpayers.

Under Wisconsin's human and social service systems, the bulk of services to assist families and individuals in need are delivered by counties. See secs. 46.031, 46.22, 46.23, 46.238, 46.281, 46.90, 48.06, 49.325, 51.42, 51.437, 55.043,

⁹ Sec. 342.17(4)(b), Stats.

¹⁰ Secs. 861.21 and 861.33, Stats.

55.045, Stats., *etc.* By making it possible for domestic partners to care for each other, there is less need for government assistance. The ability to obtain family or medical leave without losing employment to care for each other makes it more likely that families of domestic partners can survive on their own. If the earning domestic partner dies, there is a means of support for the non-earning surviving partner and the household does not need to be dismantled in probate. Tax paying citizens as a whole benefit when domestic partnership families quietly take care of themselves.

III. DANE COUNTY OPERATES A DOMESTIC PARTNERSHIP REGISTRY UNDER ITS POLICE POWERS TO ASSIST DANE COUNTY FAMILIES.

The protections provided to registered domestic partners under Dane County's registry for opposite sex partners are more limited than the protections provided under the state registry. However, the reason for creating the registry is the same. By recognizing and supporting domestic partners who share the same households, Dane County's

¹¹ Sec. 861.35, Stats.

domestic heterosexual domestic registry helps enable these families to care for themselves, making it less likely that they will need government assistance.

CONCLUSION

Plaintiffs-Appellants have failed to prove Chapter 770 and related statutes are unconstitutional beyond a reasonable doubt. The state's exercise of police powers in providing for the welfare of registered domestic partners and their families is inherent and constitutional. The state thus also provides for the general welfare of tax paying citizens by assisting registered domestic partners to care for each other and their children in times of need and crisis.

Respectfully submitted this _____ day of November, 2011.

Dyann L. Hafner, SBN 1009541
Assistant Corporation Counsel
1202 Northport Dr., Room 432
Madison, Wisconsin 53704
608-242-6483

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19 (8) (b) and (c), Stats., for a brief produced with a proportional serif font. The length of this document is 2,928 words.

Dated this _____ day of November, 2011.

Dyann L. Hafner, SBN 1009541
Assistant Corporation Counsel
1202 Northport Dr., Room 432
Madison, Wisconsin 53704
608-242-6483

CERTIFICATION REGARDING COMPLIANCE
WITH RULE § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical to the text of the paper copy of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of November, 2011.

Dyann L. Hafner, SBN 1009541
Assistant Corporation Counsel
1202 Northport Dr., Room 432
Madison, Wisconsin 53704
608-242-6483

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of November, 2011.

Dyann Hafner
Assistant Corporation Counsel
State Bar No. 1009541

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