CITY OF MADISON
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OPINION #05-001

TO: Mayor David Cieslewicz

FROM: Michael P. May, City Attorney

DATE: February 22, 2005

SUBJECT: **2003 Assembly Joint Resolution 66 – Proposal to create section 13, Article XIII of the Wisconsin Constitution, "relating to: providing that only a marriage between one man and one woman shall be valid or recognized in this state."**

2003 AJR 66 is a proposed amendment to the Wisconsin Constitution regarding marriage and the legal rights of unmarried persons. You have asked my opinion on the potential effects of this amendment on the City of Madison's Domestic Partnership ordinance and related policies.

As I explain below, neither the proposed amendment nor similar amendments in other states have been subject to interpretation by the courts. Thus, predicting future judicial interpretation is difficult and cannot be ascertained with certainty. Nonetheless, I conclude that a number of benefits that flow to unmarried domestic partners under Madison's ordinances, contracts and city policies likely would be found to create "a legal status . . . substantially similar to that of marriage" and would, therefore, be declared void. These include protections under Madison's Equal Opportunities Ordinance and health insurance reimbursement.

THE PROPOSED AMENDMENT

The language of the proposed amendment is 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."

2003 AJR 66 was presented on February 9, 2004, not long after the Massachusetts Supreme Court decided *Goodridge v. Dept. of Public Health*, declaring that to limit "the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." 440 Mass. 309 at 342, 798 N.E.2d 941 (Mass. 2003).

The resolution passed both the Wisconsin assembly and senate in 2004. It would have to pass both houses during this legislative session in order to be presented to the voters. The proposed amendment to the Constitution must be approved by the voters to be effective.

MADISON'S DOMESTIC PARTNERSHIP ORDINANCE AND POLICIES

The first sentence of the proposed language would not directly affect city government because cities do not issue marriage licenses in the state.

The following City of Madison Ordinances or policies could be affected by the second sentence:

1. **Domestic Partner Registry under MGO 3.23(11).** Sec. 3.23(11) is Madison's Domestic Partner Ordinance, adopted in 1990. This subsection of the Equal Opportunities Ordinance creates a registry for those wishing to declare they are in a Domestic Partnership relationship. Couples fill out a Domestic Partnership Application Form and the City Clerk issues a Registration Certificate, if the criteria are met, after a three-day waiting period. Sec. 3.23(11)(c). The criteria for registration are found in sec. 3.23(2)(o):

   > (o) Domestic partnership means two adults and their dependents, if any, which satisfy the following requirements:
   >
   > 1. They are in a relationship of mutual support, caring and commitment and intend to remain in such a relationship in the immediate future; and
   > 2. They are not married (unless they are married to each other) or legally separated and, if either party has been a party to an action or proceeding for divorce or annulment, at least six (6) months have elapsed since the date of the judgment terminating the marriage; and
   > 3. Neither domestic partner is currently registered in a domestic partnership with a different domestic partner and, if either partner has previously been registered as a domestic partner in a domestic partnership, at least six (6) months have elapsed since the effective date of termination of that registration; and
   > 4. Both are 18 years of age or older; and
   > 5. Both are competent to contract; and
   > 6. They are occupying the same dwelling unit as a single, nonprofit housekeeping unit, whose relationship is of permanent and distinct domestic character; and
   > 7. They are not in a relationship that is merely temporary, social, political, commercial or economic in nature.

2. **Protections for Domestic Partnerships under the Equal Opportunities Ordinance.** MGO 3.23 includes domestic partner status as a protected class for some purposes, but not all purposes.

   Currently, sec. 3.23(5) makes it an unlawful, unfair discriminatory practice to discriminate on the basis of domestic partnership status in a public place of accommodation or amusement.[1] This section also requires that organizations offering public accommodations and that "sell memberships based on family status shall provide the same benefits to domestic partnerships as are provided to other families." Violations of the Equal Opportunities Ordinance may be dealt with as a complaint to the EOC, prosecuted as an ordinance violation with a forfeiture between $100-$500, or by civil action in circuit court, including petitions for temporary relief or injunction.

3. **Health insurance reimbursement for domestic partners registered under 3.23(11).**

   + **Collective Bargaining Agreements.** The City currently provides a benefit to domestic partners of city employees through labor contracts with all of its bargaining units. (See sample policy from MCAA contract, attached.) This "benefit" is only a partial reimbursement of out-of-pocket premium costs paid by a domestic partner of

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[1] The rest of 3.23 does not include domestic partnership as a protected class. For example, domestic partnership status is not currently listed under 3.23(4) (Housing,) 3.23(7) (City Facilities), 3.23(8) (Employment Practices), or in the catch-all in 3.23(9). Domestic partner status is also not included in the mandatory non-discrimination language that must be included in all city contracts (sec. 3.58(9)(b).)

a City employee. The City does not pay the premium for the partner and is currently precluded by the state employee insurance system from including domestic partners in a family health plan.

+ **Human Resources Policy of Reimbursement.** The City currently provides the same benefit described above to partners of nonrepresented employees (not subject to a collective bargaining agreement.) See the attached "City of Madison Health Insurance Premium Reimbursement Form," available at the Clerk's office, for description of the reimbursement policy.

+ **Intent to include partners in family health insurance plans.** Two ordinances codify the City's intent to provide family health insurance coverage to domestic partners as soon as the applicable State of Wisconsin group health insurance plan allows it: Sec. 3.38(26), applicable to all employees in the absence of a collective bargaining agreement to the contrary, and 3.52(1)(h) which is specific to nonrepresented transit division employees, both state as follows:

"Employees registered in domestic partnerships under Section 3.23(10), Madison General Ordinances, [now 3.23 (11)] will be eligible for family health insurance coverage when such coverage is permitted under the terms of the Wisconsin Public Employers' Group Health Insurance Plan" [Wisconsin Area Health Fund for nonrepresented transit employees.]

4. Other Rights and Responsibilities of Domestic Partners under city ordinances.

MGO sec. 3.36(13) considers domestic partners "immediate family" and authorizes up to 3 days paid bereavement leave for city employees for a death in the immediate family (applicable to permanent and some hourly city employees in the absence of a collective bargaining agreement to the contrary.) The domestic partner must be registered with the City Clerk under sec. 3.23(11) in order to qualify.

MGO sec. 3.47(2)(d) also considers "registered domestic partners" to be "immediate family members" for purposes of required disclosures under the Ethics Ordinance. Sec. 3.47(2)(f) includes "registered domestic partners" in the list of relationships which give rise to a "personal interest" under the Ethics Ordinance. Sec. 3.47(7)(e) likewise considers domestic partners "immediate family" for purposes of the prohibition against favoritism in hiring or promotion (nepotism.)

Each of these ordinances place domestic partners on the same level as a married spouse, for purposes of receiving a benefit as well as added responsibility.

5. Citizens of Madison who receive other benefits from the Registry.

The Domestic Partner registry is open to all residents, not just city employees. We cannot know the extent of the rights and benefits realized by private citizens under the ordinance. For example, a Madison resident may work for a private employer who extends health care coverage to his or her partner expressly because they have a Certificate of Registration as Domestic Partners from the City of Madison. The same couple may belong to a co-op that provides a family discount but requires proof of a family commitment, accepting the Certificate as proof. Other branches of government might accept proof of Madison registry for health insurance purposes. There could be many other services and private organizations that recognize Madison domestic partnership in a way that provides concrete rights or "status," beyond the walls of City Hall. The City has an interest in seeing that our citizens are not stripped of these rights as a result of this proposed Constitutional amendment.

EFFECT OF THE PROPOSED AMENDMENT ON THE CITY'S ORDINANCES

As described above, the first sentence of the amendment will not affect the city. The second sentence presents several questions: What is "a legal status substantially similar" to marriage? Is Madison's domestic partnership ordinance "substantially similar to marriage?" Would the proposed amendment invalidate any part of our ordinance or policies?

"The established rule is that constitutional amendments which deal with the substantive law of the state are presumed self-executing in nature and prospective in effect, and that such amendments repeal inconsistent statutes and common law which arose under the constitution before the amendment." *Kayden Industries, Inc. v. Murphy,* 34 Wis.2d 718, 731, 150 N.W.2d 447 (1967).

I must stress that my opinion on this matter necessarily includes predictions about how the constitutional language *might* be interpreted by a court and how it *might* be applied to the City's policies. Therefore, this Opinion can only lay out the possible arguments and suggest possible conclusions.

1. Framework for Legal Interpretation.

A. "Legal Status."

In order to determine whether the City's laws creates a "legal status substantially similar to marriage" we must first identify the "legal status." Each of the city policies listed above could be considered a "legal status" because they have been created by municipal ordinance or by contract, and confer a legal benefit or responsibility.

B. "Substantially Similar."

The next question is whether the legal status created by the City would be considered "substantially similar" to that of marriage. (No one would argue that domestic partnership is legally identical to marriage.)

The immediate problem is deciding what "substantially similar" means. Other groups who have researched this amendment have put out statements suggesting this clause is vague, overly broad, and therefore will spur litigation over its meaning[2] A phrase like "substantially similar to" requires not only the voter, but the public official charged with following the Constitution to determine what they think is "substantially similar" to marriage. This phrase does not put the reader on notice as to exactly what is covered. The second sentence conceivably could be challenged as unconstitutionally vague under the procedural due process protections of the 14th Amendment to the U.S. Constitution. See *State v. Ehlenfeldt*, 94 Wis.2d 347, 355, 288 N.W.2d 786 (1980) (constitutional foundation to a vagueness challenge is the procedural due process requirement of fair notice).

Assuming that "substantially similar" will mean something like "almost the same as but not quite as good as marriage," there are at least two different ways to compare domestic partnership to marriage.[3]

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[2] See Action Wisconsin Education Fund brochure dated 4/21/04, at www.actionwisconsin.org, quoting Sen. Scott Fitzgerald on the second sentence: "by putting 'substantially similar' in (the amendment), we're asking the court to step in."

[3] This is a problem in itself; we cannot predict which analysis a litigant or a judge would choose.

1.) "Substantially Similar" as a Total Package or Bundle of Rights.

The first way is to review the total combination of rights that are conferred upon domestic partners, when taken as a whole. The classic analogy of a "bundle of sticks," used by legal scholars to identify property rights, could be used for this analysis. Each individual right or protection is considered one "stick" in the bundle, and by itself, is not significant. Only after you have accumulated a certain number of sticks will you attain the "legal status substantially similar " to the legal status of marriage.

The Wisconsin Legislative Council has offered the opinion that a municipality could never create a combination or "bundle" of rights that adds up to be the same as or close to marriage, therefore cities have nothing to worry about (See January 29, 2004 Memorandum to Rep. Mark Gundrum, attached.) However, the Legislative Council acknowledges that:

> "It is less clear whether, by conferring various rights and benefits of marriage piecemeal *over time*, [a legislative body] may. . . effectively confer the legal status of marriage or a status substantially similar to marriage on unmarried individuals. Arguably, under the proposed language, [legislators] 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." Leg. Council Memo, pp. 3-4.

This exposes a major flaw and danger of the proposed amendment: *how many* rights must be added up, how many "sticks" must be bundled together before the status is considered "substantially similar" to marriage? What is the magic number? When will Madison reach that point? Have we already?

2.) "Substantially Similar" as Individual Rights, Reviewed Separately.

Because there is arguably no way to identify the magic number of rights that constitute a sufficient number to be substantially similar to marriage, a court may resort to another method of comparison -- examining each individual right as a separate "legal status," such as the right not to be discriminated against in public accommodation, to see whether it is identical or similar to a right provided based on marital status. This second approach seems at least as likely, in my opinion, as the bundle of sticks approach. Such an individual analysis surely places the City's Domestic Partner policies at risk. A court could very easily analyze <u>one</u> legal protection under <u>one</u> ordinance, find it to be substantially similar to a legal right of a married person, and the ordinance would be struck down.

This approach was specifically endorsed in one case discussed below, the dissenting opinion in *May v. Daniels*, -- S.W.3d --, 2004 WL 2250882 (Oct. 7, 2004, Ark.). The ruling dealt with a procedural question on the Arkansas Constitutional Amendment, but the dissenting opinion certainly demonstrates that a court might adopt this view.

There is an additional reason a court might adopt this view. The proposed amendment is aimed specifically at restricting the rights of a minority group, gays and lesbians and other non-traditional families. It is unusual in American constitutional history in that it is designed to restrict the rights of citizens.[4]

In interpreting the meaning of the proposed amendment, a court surely would take note of the punitive intent of the proposed amendment: to be certain that the rights of an identified minority group are restricted. As such, a court easily could give the amendment broad reach to eliminate rights.

2. Possible Effects on City's Ordinances and Policies.

The impact on the City's ordinances and policies will greatly depend on which of the two approaches set out above is taken by the court. If the court views the legal status, rights and benefits under the Madison ordinances and policies as a package or as a "bundle of rights" there is a much better chance that the rights would not be declared invalid. Under this analysis, as much as the Madison ordinances, contracts, and policies attempt to gain for domestic partners some share of equal rights, it is unlikely that a court would find that those rights created a "legal status . . . substantially similar to that of marriage." This is due to the simple fact that municipalities, under state law, cannot extend sufficient rights to be substantially similar to those of marriage. For example, the General Accounting Office estimates that over 1000 federal laws extend benefits to married couples. (GAO letter of 12/31/97 to Rep. Henry Hyde.)

However, if a court were to utilize the individual rights approach, I conclude that many if not all of the rights set out in the Madison ordinances, contracts, and policies would be declared void. It is worth noting that the Registry ordinance itself refers to domestic partnership as a "status." It is a status granted by law, an ordinance of the City of Madison. Certain benefits that are, as will be set out below, substantially similar to those of married persons flow from registration under the ordinance. A court could easily find that any or all of these amount to a legal status substantially similar to that of marriage.

In the section that follows, I will analyze how the City's policies and status would be considered under the individual rights methodology set out above, based on my overall conclusion that if the other methodology were used, the City's benefits would likely survive.

A. Domestic Partner Registry under MGO 3.23(11).

If the rights, responsibilities and legal protections afforded to Madison's domestic partners are bundled up and compared to the rights and protections of marriage, the domestic partnership bundle is smaller than the marriage bundle. Under this analysis, nobody would argue that the Madison Domestic Partnership ordinance creates a status equal to marriage. However, some features of the Registry are very similar to marriage, when analyzed individually.

1). Procedural similarities between marriage statute and domestic partner ordinance:

Criteria for entering the relationship: Comparing the criteria for entering into the relationship, domestic partnerships could be considered "substantially similar" to marriage. Marriage is considered by statute to be "a legal relationship between 2 equal persons, a husband and wife, who owe each other

[4] If one examines the twenty-six amendments to the U.S. Constitution, for example, only two amendments arguably restricted citizens' rights: the 16th Amendment, authorizing an income tax, and the 18th Amendment, authorizing prohibition -- later repealed.

mutual responsibility and support." Wis. Stat. sec. 765.001(2). The domestic partner ordinance requires, among other things, the partners to declare that "They are in a relationship of mutual support, caring and commitment and intend to remain in such a relationship in the immediate future." MGO 3.23(2)(o)1.

Procedural requirements: The City's registration requirements mirror some aspects of state-law marriage: (1) there is a license fee; (2) if you are already in a domestic partnership you cannot register for another one; (3) you must wait 6 months after divorce, annulment, or termination of a prior domestic partnership before entering into a new domestic partnership; (4) you must be 18 years of age or older, (marriage if 16 or 17 requires consent from parents); (5) there is a short waiting period (3 days) before a certificate of domestic partnership is issued, the state requires 6 days for a marriage license.

Contractual nature. Domestic Partners under our ordinance must be competent to contract, although the ordinance does not specifically designate the partnership as a civil contract. It also does not preclude partners from making a private contract for purposes of running their household. Marriage is specifically considered a civil contract under Wis. Stat. sec. 765.01.

2.) Procedural differences between marriage and domestic partnership.

Solemnization of vows. Under state law, marriage does not become a valid civil contract until vows are exchanged before a person authorized to officiate, and two witnesses. Wis. Stat. sec. 765.16. (The vows required under that statute are "to take each other as husband and wife.") There is no corresponding requirement for a ceremony, officiant or witnesses in order to register as Domestic Partners, although such ceremonies may be observed.

Miscellaneous criteria. The state law requires proof of residency, social security number, statement that the future spouses are not related closer than 2nd cousin or sterile, and the ability of others to object. The City has no such requirements for a Domestic Partner certificate.

Termination. The procedure for terminating the relationships are not substantially similar. A City of Madison domestic partnership can be terminated simply by one or both parties notifying the Clerk. MGO 3.23(11)(d). Domestic partners must also notify the clerk of "change in status of their domestic partner relationship," which is not defined, but apparently a self-reporting procedure. MGO 3.23(11)(b). By contrast, marriages may only terminate after formal separation, divorce or annulment proceedings, in state circuit court. See Ch. 767 Wis. Stats.

Double Registration: Another major difference is that two people *who are already married to each other*, may register as Madison domestic partners. This is a strong statement of recognition that marriage under the current state law is *not* the same as registration as a domestic partnership (and also eliminates the possibility of discriminatory application of the domestic partner ordinance based on marital status.)

Availability to Same-Sex Couples. This is an obvious difference but one that the proposed amendment does not verbalize. The City's domestic partner

registration is open to unmarried couples of any gender combination. State law marriage is only available to "husband and wife." Wis. Stat. sec. 765.001(2). The Wisconsin Attorney General has interpreted this to make same-sex marriage illegal under that statute. (May 13, 1997 correspondence from James D. Doyle to Rep. Dave Travis, and October 21, 2003 correspondence from Peggy Lautenschlager to Rep. Marc Pocan.)

The structure of the Madison ordinances and benefits raise a peculiar issue, one that perhaps is only of interest to lawyers. The ordinance allowing domestic registries in and of itself creates no rights or benefits. However, completing that registry does entitle those who are registered to certain rights and benefits under other ordinances. Based upon this, one could argue that the domestic registry itself does not create a "legal status substantially similar to that of marriage." Under this analysis, a challenge to the ordinances might leave the registry standing, while striking out the benefits discussed below.

Another legal view is that it is the registry which creates the "legal status." As noted above, the registry itself refers to registration as a legal status, in requiring persons to notify the Clerk of a "change in status" under the ordinance. Under this alternative view, one could argue that the status is created by the registry, and that a legal challenge would simply strike down the domestic registry, with all the other benefits obviously falling with it, due to the invalidity of the registration.

These differences have little practical effect. Whether a court were to strike down only the domestic registration, only the benefits, or both the registration or benefits, the practical effect on those registered under the Domestic Partner Registry would be the same: they would lose the benefits provided by Madison under its ordinances and policies. Thus, I need not reach the question of whether the "legal status" is conferred by this one ordinance, or the combination of ordinances and contracts and policies. In my opinion, the status and benefits conferred upon domestic partners, if viewed under the "individual rights" analysis set forth above, amount to a "legal status substantially similar to marriage" and likely would be struck down by a court.

B. Protections for Domestic Partnerships under the Equal Opportunities Ordinance.

If a judge reviews each ordinance individually as a separate legal right, and compares it to marriage, Madison's protection for domestic partners under MGO 3.23(5) would be struck down because it creates a protected class for domestic partners on par with married persons. Sec. 3.23(5) lists domestic partnership status right alongside marital status. A person may not discriminate on either basis. To that extent, MGO 3.23(5) creates a legal right that is *identical* to marriage – the right not to be discriminated against in public accommodations. That right could be considered "not valid" and "not recognized in this state" if the proposed amendment passes.

Furthermore, if the City should choose to add domestic partnership status to the lists of protected classes for other purposes (housing, employment, etc.) the proposed amendment could prohibit such legislation from ever being adopted.

C. Health insurance reimbursement.

Whether by collective bargaining agreement, ordinance, or policy, the reimbursement currently provided could be challenged as a benefit substantially similar to the health insurance coverage provided to married spouses. It is not identical, because it is a partial reimbursement, but the policies are financially similar enough to be challenged under the

proposed amendment. Either the legally binding labor agreements or the ordinance create the legal status that entitles the person to the benefit. Current bargaining agreements (and policy for unrepresented employees) would be meaningless and the benefit would be invalidated.

D. Other ordinances creating rights and responsibilities.

The Ethics ordinance places domestic partners on equal ground with marital spouses and creates important ethical obligations, in multiple subsections. Taken as a whole throughout the ethics ordinance, the domestic partner is considered the same as a married spouse. Therefore, those restrictions could be struck down and the City would lose an important ethics tool.

Sec. 3.36, allowing a bereavement leave for employees if their domestic partner dies, considers domestic partners to be family members identical to married spouses. As an individual right identical to that for married persons, it could be taken away by the proposed amendment.

E. Citizens of Madison registered as Domestic Partners who receive benefits from other sources.

This is more difficult to quantify. The problem would arise if and when sec. 3.23(11) were invalidated. If all of the currently registered partnerships would be considered void, outside entities might refuse to recognize the partnership and take away benefits previously based upon that registration. Or, opponents of domestic partnership might sue the entity that continues to recognize a City of Madison domestic partnership, arguing that the Wisconsin Constitution prohibits recognition of such a union.

STATUS OF AMENDMENTS IN OTHER STATES

Several states have adopted constitutional amendments with language like the second sentence in the Wisconsin proposal. (Kentucky, Arkansas, North Dakota, Ohio, Utah, Oklahoma.) We are not aware of any cases thus far where the court analyzes the *substance* of the amendment language or the phrase "substantially similar to marriage."[5] Lawsuits are pending in Georgia, Oregon, Oklahoma and Kentucky, challenging adopted amendments on procedural grounds. The Kentucky language is identical to Wisconsin's proposal. The Kentucky case, *Wood v. Commonwealth of Kentucky*, 04-CI-11537, was filed in November and is pending in state court.

Lawsuits resulting in published decisions were decided in many states *prior* to placement on the ballot -- all procedural challenges such as the sufficiency of ballot titles, or whether a proposed amendment violates the "single subject" rule or other procedures for amending the state constitution. See *Forum for Equality PAC v. McKeithen*, -- So.2d --, 2005 WL 106567 (La. Jan. 19, 2005), *May v. Daniels*, -- S.W.3d --, 2004 WL 2250882 (Ark., Oct. 7, 2004).

These lawsuits have a common theme: the amendments, publicly promoted as necessary to define marriage, go far beyond defining marriage to outlaw civil unions and other types of non-marriage civil arrangements and the legal benefits thereof. Voters at the polls are not aware of the far-reaching effect

[5] The 1996 U.S. Supreme Court case *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996) examined and struck down a Colorado constitutional amendment which involved much more blatantly discriminatory language. *Romer* demonstrates that state constitutional amendments are subject to review and invalidation under the U.S. Constitution, in this case, the Equal Protection clause of the 14th Amendment. Thus far, there have been no cases analyzing the substance of the language of the post-*Goodridge* state constitutional amendments under the U.S. Constitution.

the amendment could have, and that it is improper to adopt one constitutional amendment that covers more than one subject (i.e. defining marriage as between man and woman, AND invalidating legal benefits similar to marriage for unmarried couples). However, none of these lawsuits has been successful. Courts have been reluctant to take the decision away from the voters.

The Arkansas Supreme Court heard one such challenge in *May v. Daniels*, -- S.W.3d --, 2004 WL 2250882 (Ark., Oct. 7, 2004). Citizens filed a lawsuit to stop the amendment from being placed on the November ballot, arguing the "popular name" and "ballot title" were misleading and did not inform voters of the effect of the proposed amendment. The challenge was based on this clause: *"A legal status for unmarried persons which is identical or substantially similar to martial status shall not be valid or recognized in Arkansas."* This is almost the same as the second sentence of the Wisconsin proposal. The plaintiffs argued that the average voter would not understand the effects that this phrase could have on unmarried couples, singles, or on the legal recognition of any future union or partnership.

The Arkansas Supreme Court disagreed, concluding that the popular name and ballot title sufficiently informed voters of the subject of the amendment. The court was careful to explain that they are not in the position of interpreting unadopted amendments, but only responding to a procedural challenge. *Id.* Therefore the court did not directly analyze what is meant by "a legal status substantially similar to marriage." But a dissenting justice had this to say: "the popular name is misleading and does not indicate that the amendment could be used to impair or invalidate rights of unmarried persons." The judge pointed out a long list of current Arkansas statutes that confer rights to unmarried persons that are similar or identical to rights for married persons. Specifically, one statute allows employers to extend employment benefits to unmarried domestic partners, allowing them to receive the same benefits from an employer as married couples:

> "Arkansas Code Annotated § 9-11-208 (Supp.2003) allows employers to extend benefits to the unmarried domestic partners of an employee. This statute allows an unmarried man and woman to receive the same benefits from an employer that a married couple receives. ***These are rights or a legal status that is identical or substantially similar to the rights conferred by marital status. The consequences of Proposed Amendment 3 could reach all domestic partners receiving benefits from employers."*** *May v. Daniels,*-- S.W.3d--, 2004 WL 2250882 (Ark. 2004), (Thornton, J., dissenting), emphasis added.

I agree with the dissenting Justice – the same clause, in Wisconsin, could be applied to invalidate many of Madison's domestic partner benefits provided by the City.

CONCLUSION

Sec. 3.23(11), Madison's Domestic Partnership ordinance, allows persons meeting the criteria therein to register as domestic partners. Individual legal rights and responsibilities for domestic partners flow from other legal authorities of the City: nondiscrimination in public accommodation, health insurance reimbursement, bereavement leave, ethics obligations, and recognition by other entities. If these rights are analyzed individually, any one of them could be considered substantially similar to a right provided to a married person. If the City chooses to extend further benefits on the basis of domestic partnership, the totality of benefits could be challenged as "substantially similar" to marriage. Finally, the registry under 3.23(11) could be challenged on its face, as creating the "legal status" from which those benefits flow.

The City's Domestic Partnership registry is intended for persons who are committed financially, emotionally, "in mutual support, caring and commitment." The ability to register, the declarations involved in registration, and limited protections are very important to the people who have availed themselves of the registration.

Aside from the reversal of important policy, there are specific negative outcomes: the City could not enforce 3.23(5) against somebody who refuses to provide a public accommodation based on domestic partner status, individuals could sue the City because they do not want their tax dollars to pay for health insurance for domestic partners, citizens could lose benefits from private employers who previously recognized the City's domestic partner registry. We agree with the Legislative Council Memorandum that the chosen language of this amendment makes it very difficult to predict any specific legal outcome.

However, I conclude that benefits resulting from the City's Domestic Partner ordinance could be legally challenged and invalidated, in whole or in part, under the language of 2003 AJR 66.

Michael P. May
City Attorney

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Enclosures

CAPTION: Madison's protections for domestic partners easily could be invalidated if 2003 AJR66 is adopted and Wisconsin's Constitution is amended to invalidate any "legal status . . . substantially similar to that of marriage."