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Date: May 13, 2016

To: County Clerk Joseph J. Czarnezki
Register of Deeds John LaFave
Deputy County Clerk George Christenson

cc: Deputy Corporation Counsel Colleen A. Foley
Deputy Corporation Counsel Paul D. Kuglitsch
Interested Parties

Re: Opinion: Opposite sex couples are eligible for Ch. 770 Domestic Partnerships

Summary

Wis. Stats. Chapter 770 states that same-sex couples who meet other criteria may form domestic partnerships. This can lead to certain benefits, such as one partner qualifying for the other's health insurance coverage, if the plan allows.

In my opinion, domestic partnerships in Wisconsin are no longer limited to same-sex couples and are now available to opposite-sex couples as well, despite the language of the statute. Specifically, the same-sex requirement for domestic partners found in Wis. Stat. § 770.05(5) is an unconstitutional violation of equal protection. Sec. 770.05(5) is no longer valid, and domestic partnerships should be available to any couple that meets the other criteria set out in Ch. 770, regardless of whether the couple is same-sex or opposite-sex.

My opinion is based on the federal court rulings that paved the way for same-sex marriage in Wisconsin, notably *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).¹

Background

In 2006, votes by the people and legislature of Wisconsin resulted in the enactment of a new provision in 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.

Art. XIII, § 13. That constitutional amendment was followed three years later (in 2009) by the domestic partnership statute, which creates certain legal rights for a registering couple. Per the

¹ A resident recently asked her County Board supervisor why, in light of the same-sex marriage rulings, domestic partnerships were still limited to same-sex couples. That inquiry prompted this analysis.

statute, “[t]wo individuals may form a domestic partnership if they satisfy all of the following criteria:

- (1) Each individual is at least 18 years old and capable of consenting to the domestic partnership.
- (2) Neither individual is married to, or in a domestic partnership with, another individual.
- (3) The 2 individuals share a common residence. Two individuals may share a common residence even if any of the following applies:
 - (a) Only one of the individuals has legal ownership of the residence.
 - (b) One or both of the individuals have one or more additional residences not shared with the other individual.
 - (c) One of the individuals leaves the common residence with the intent to return.
- (4) The 2 individuals are not nearer of kin to each other than 2nd cousins, whether of the whole or half blood or by adoption.
- (5) The individuals are members of the same sex.

Wis. Stat. § 770.05.

Chapter 770 does not specify the rights of domestic partners. Rather, sprinkled throughout the statutes are references to certain rights of married persons that will also apply to domestic partners. For example, Wis. Stat. § 861.21(2), the statute assigning to a surviving spouse his or her decedent spouse’s interest in their home, was made applicable to domestic partnerships. A Wisconsin employee can obtain family leave to care for a domestic partner. Wis. Stat. § 103.10(3)(b)3. But the presumption in Wis. Stat. § 766.31(3) that all property of married couples is marital property was **not** extended to domestic partners. Domestic partners can **not** file joint federal tax returns. They can **not** obtain joint fishing licenses. Wis. Stat. § 29.219(4).

In 2014, a group of same-sex couples challenged Wisconsin’s marriage amendment. The result was a federal court ruling on June 6, 2014, that the state’s marriage amendment and related statutes are unconstitutional and unenforceable. *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. 2014).

The federal appeals court agreed in *Baskin* (which also overturned Indiana’s same-sex marriage ban), and the United States Supreme Court refused to upset that ruling. *Baskin*, *supra*, cert. denied, 135 S.Ct. 316 (Oct. 06, 2014). As a result, same-sex marriage is legal in Wisconsin, and the marriage amendment and related statutes are unenforceable.

Analysis

Any discriminatory law “must bear a rational relationship to a legitimate governmental purpose.” *Baskin*, 766 F.3d at 665, quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996). Any group or individual – even a presumed majority group such as opposite-sex couples – can claim the benefit of equal protection under the law. “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should

be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), citation omitted.

What has changed in Wisconsin as a result of *Wolf* and *Baskin* is that same-sex and opposite-sex couples are now “similarly situated” in the eyes of the law in terms of the right to marry. “[T]he governments of Indiana and Wisconsin have given us no reason to think they have a ‘reasonable basis’ for forbidding same-sex marriage,” the Seventh Circuit ruled. *Baskin*, 766 F.3d at 654.

If the gender of the partners is no longer grounds for discrimination in marriage laws, it can hardly be a basis for discrimination in the lesser formalities of the domestic partnership laws.

In summary, the same equal protection analysis that led the federal courts to declare Wisconsin’s ban on same-sex marriages to be unconstitutional applies to the attempt to limit domestic partnerships to same-sex couples. It is likewise unconstitutional. Wis. Stat. § 770.05(5) should not be enforced in applications for domestic partnerships.



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