Appeal No. 2008AP1868 **Cir. Ct. No. 2007CV2657**

WISCONSIN COURT OF APPEALS
DISTRICT IV

WILLIAM C. MCCONKEY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

J. B. VAN HOLLEN, IN HIS ROLE AS ATTORNEY GENERAL OF WISCONSIN,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

FILED

APR 09, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

The central question in this appeal is whether Article XIII, Section 13 of the Wisconsin Constitution, commonly known as the marriage amendment, was enacted in violation of the single-subject rule set forth in Article XII, Section 1 of the Wisconsin Constitution. Resolution of this question will require clarification of the proper legal standard and methodology for determining the purpose of a constitutional amendment under the single-subject rule. A cross-appeal raises an additional issue of first impression regarding standing—namely, whether a voter who would have voted the same way on each of two propositions included in a single-ballot referendum can claim to have personally suffered a direct injury by an alleged violation of the single-subject rule. Because this appeal presents several novel issues, and because the validity of the marriage amendment is a matter of significant public interest with statewide implications, we hereby

certify this appeal to the Wisconsin Supreme Court for its review and determination, pursuant to WIS. STAT. RULE 809.61 (2007-08).[1]

BACKGROUND

In two successive sessions, both houses of the Wisconsin Legislature adopted resolutions to create a new provision in the Wisconsin Constitution relating to marriage. *See* 2005 Assembly Joint Resolution 67; 2005 Senate Joint Resolution 53. The proposed marriage amendment was submitted to voters for ratification by a referendum question asking:

> Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?

The ballot measure passed on November 7, 2006.

William McConkey, a registered voter and taxpayer of this state, filed suit seeking to have the marriage amendment declared invalid on multiple substantive and procedural grounds, including an alleged violation of the single-subject rule. Relevant to this appeal, he claimed that the first part of the referendum question limiting marriage to only one man and one woman was a separate subject from the second part refusing to recognize any substantially similar legal status to marriage for unmarried individuals. McConkey stipulated that, if the two parts of the ballot question had been presented separately, he would have voted no on each part.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The circuit court held that McConkey has standing to raise the single-subject issue based on his status as a voter. It then concluded, however, that the proposed amendment was properly presented as a single question on the ballot. McConkey appeals, and the attorney general cross-appeals the standing ruling.

DISCUSSION

Article XII, Section 1 of the Wisconsin Constitution sets forth a procedure for the people of this state to ratify constitutional amendments proposed by the legislature "provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately." There appear to be only three Wisconsin cases interpreting this provision.

In ***State ex rel. Hudd v. Timme***, 54 Wis. 318, 11 N.W. 785 (1882), the court held that a proposed salary raise for legislators was properly included in the same ballot question as proposed changes to the tenures of senators and assemblymen and to the timing of legislative sessions as part of a general scheme to change the legislative sessions from annual to biennial. The court noted that "an amendment … might consist of considerable detail" such that "a defeat of one of its important matters of detail might destroy the usefulness of all the other provisions when adopted." ***Id.*** at 335. The court then created the following test: "In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." ***Id.*** at 336. The court acknowledged that the increased salaries were perhaps not as necessary to the whole biennial session scheme as the other proposed changes were to each other,

but reasoned that the salary issue was "clearly connected with" the change to biennial sessions because the compensation was being enlarged in conjunction with the enlargement of the legislators' duties. ***Id.*** at 336-37. The court went on to state that the legislature has some discretion to determine what should be proposed as a single amendment, and should not be compelled to submit as separate amendments "the separate propositions necessary to accomplish a single purpose." ***Id.*** at 337.

In ***State ex rel. Thomson v. Zimmerman***, 264 Wis. 644, 656-57, 60 N.W.2d 416, 61 N.W.2d 300 (1953), the court held that separate ballot questions were required to decide whether to amend the constitution to allow geographical area as well as population to be considered in the formation of state senate districts; to remove the prior requirement that assembly districts be formed according to county lines; and to remove the exclusion of untaxed Indians and military personnel in the population count for the purpose of determining both senate and assembly districts. The court noted that the main purpose of the proposed amendment—as stated by the attorney general—was to take area as well as population into account when apportioning senate districts. ***Id.*** at 656. Citing ***Hudd***, the court then reasoned that the additional propositions included in the ballot question did not "tend to effect or carry out that purpose" and could not be counted as a "detail" of that purpose. ***Thomson***, 264 Wis. at 656.

In ***Milwaukee Alliance Against Racist & Political Repression v. Elections Board***, 106 Wis. 2d 593, 317 N.W.2d 420 (1982), the court held that a proposition allowing courts to deny or revoke bail for certain persons was properly presented in a single ballot question with another proposition allowing courts to set bail and other conditions for the release of accused persons to assure their appearance in court, protect members of the community, or prevent the

intimidation of witnesses. The court reasoned that allowing judges to deny bail for reasons of community safety and allowing them to set non-monetary conditions for release were "integral and related aspects of the amendment's total purpose," which was "to change the historical concept of bail with its exclusive purpose of assuring one's presence in court … to a comprehensive plan for conditional release." ***Id.*** at 607-08. The court concluded that the ballot question passed the ***Hudd*** single-subject test because defeating either proposition would have destroyed the overall purpose of the amendment. ***Milwaukee Alliance***, 106 Wis. 2d at 607.

The first problem we see with this line of cases is that the multiple formulations of the single-subject test, originally set forth in ***Hudd***, do not appear to be consistent with one another. That is, a requirement that separate propositions must be at least "connected with each other" would seem to be considerably broader than a requirement that they be "dependent upon" one another, such that the defeat of one would destroy the usefulness of other adopted propositions or defeat the overall purpose of the amendment. It does not appear that the same result would have been reached in ***Hudd*** if the legislative salary issue had to be dependent upon, rather than merely connected with, the change to biennial sessions. Yet the court's decision in ***Thomson***—that provisions relating to the formation of assembly district boundaries and population counts for both senate and assembly districts were not necessary to carry out a provision relating to the formation of senate districts—does not appear to have considered whether the measures might have been connected with each other, even if they were not dependent upon one another. Therefore, we believe clarification on the proper formulation of the single-subject test is called for.

Secondly, regardless whether multiple propositions must be "connected with" or "dependent upon" one another in order to serve the same overall purpose, we see a need for additional guidance as to the proper method for determining the purpose of a proposed amendment. Because it does not appear that the purpose of the amendments in ***Hudd***, ***Thomson***, or ***Milwaukee Alliance*** was at issue, each of those cases simply asserted an intended purpose without discussing how the court should determine purpose. Should a court look first at the language of the ballot question or the language of the legislative resolutions? What consideration should be given to materials from the legislative reference bureau and the notice provided to the public explaining the proposed amendment? Should other contemporaneous materials be considered only if there is an ambiguity in the text itself, as with determinations of legislative intent in the statutory construction context? Since the determination of purpose will often be dispositive, it is critical that guidance on this topic be provided.

We further note that the parties here dispute the interpretation of the second proposition in the marriage amendment. McConkey claims that refusing recognition of any "legal status identical or substantially similar to that of marriage" denies both same-sex and opposite-sex unmarried couples access to the same or similar legal protections granted to married couples. Under this interpretation, the validity of such things as domestic partnership benefits or hospital visitation rights could come into question. The attorney general contends that refusing recognition of any "legal status identical or substantially similar to that of marriage" merely prevents the state from creating some form of marriage-by-another-name for same-sex couples—*i.e.*¸ civil unions. To the extent that it may become necessary to interpret the constitutional provision in order to

determine its purpose, we again believe the Wisconsin Supreme Court is the most appropriate forum for this case.

Finally, on the question of standing, the attorney general argues that a voter is not injured by a violation of the single-subject rule unless he or she is actually precluded from voting for his preference on one of the multiple propositions set forth. In order for that to occur, the voter would need to allege that he would have voted differently on separate propositions contained in the referendum. McConkey counters that his impact as a voter was diminished because other voters were deprived of the opportunity to agree with his no vote regarding a prohibition on granting rights similar to those conferred by marriage on unmarried couples. That is, if the propositions had been set forth separately, significant numbers of persons may have voted yes to a ban on same-sex marriage, but no to a ban on extending similar rights to unmarried couples. We see little guidance in the case law as to the standing requirements to challenge a constitutional amendment on the grounds of an alleged violation of the single-subject rule. Accordingly, we conclude it is also appropriate to certify this case to the Wisconsin Supreme Court for clarification of the standing issue.