

**STATE OF WISCONSIN
IN THE SUPREME COURT**

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OF WISCONSIN

*In re: Petition for Amendments to
Campaign-Related Recusal Rules
SCR 60.04 (4), (5), (6), (7), and (8)*

Rule Pet. 26-01

COMMENT OF WISCONSIN FAMILY COUNCIL

The Court should avoid stepping into a legal morass by incorporating “domestic partners” into the judicial recusal standard.

First, this is potentially a substantial change that is nevertheless an afterthought in this petition—if the Court is open to this concept, this is not the right vehicle when 99% of the attention is focused on the campaign-related recusal issue. Second, if the Court does consider this change, it should retain the widespread preference of state law to define relationships only based on marriage. Third, if this Court does decide to amend the rule to incorporate domestic partners, it should at least provide judges with clarity by amending the petition’s proposed rule to specify a domestic partnership registered under Chapter 770.

ARGUMENT

First, the domestic partner provisions of the rule are underdeveloped and should not be incorporated until a careful study is made of the issue. *See*

State v. Roberson, 2006 WI 80, ¶ 30 n.11 (“This court generally does not address issues that are inadequately briefed.”). The memorandum in support of the petition dedicates exactly one sentence to the topic, and in doing so simply restates the fact of the provisions’ existence—it makes no effort at explaining, rationalizing, or providing precedent for the change. The petition’s focus is on the campaign issues, as will be the record in response to the petition. If the Court intends to change the definition of family it uses in its rule, it should have a separate proceeding that looks at the rules of other jurisdictions¹ and that consults relevant experts like the family law section of the State Bar.

Second, Wisconsin law has a clear preference for marriage. The Legislature’s intent statement at the start of Wisconsin’s family code reiterates this commitment: “It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage.

Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital

¹ For instance, the United States Senate Ethics Committee in 2007 defined “immediate family” for recusal purposes without reference to domestic partners. See U.S. Senate Ethics Comm., Letter (Sept. 12, 2007), https://www.ethics.senate.gov/public/_cache/files/428c4b64-7343-4d82-b045-398b0e2a6b27/family.pdf.

interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always.” Wis. Stat. § 765.001(2). *See A.M.B. v. Cir. Ct. for Ashland Cnty.*, 2024 WI 18, ¶ 28.

One important element of marriage is the intermingling of finances, as seen in Wisconsin’s family code and marital property law. Wis. Stat. § 765.001(2) (spouses “owe to each other mutual responsibility and support. 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 and maintenance of his or her minor children and of the other spouse.”); Wis. Stat. § 766.001(2) (“It is the intent of the legislature that marital property is a form of community property.”). This financial intermingling is an important component of the marriage obligation. The Wisconsin Department of Revenue has said that Wisconsin’s marital property law does not apply to domestic partners and that it expects domestic partners to keep separate tax accounts. Wis. Dep’t of Rev., *Effect Of Recent IRS Ruling On Wisconsin Domestic Partnerships* (June 9, 2010).² To the extent that one policy rationale for

² <https://www.revenue.wi.gov/Pages/TaxPro/2010/news-2010-100609.aspx>.

the family recusal rule is the financial intermingling that takes place between spouses or between parents and children, those practices are less pronounced for domestic partners.

Third, the petition is unclear what it means by “domestic partner” or “unmarried domestic partner.” The petition says “‘family member’ shall include unmarried domestic partners as otherwise defined in Wisconsin law.” What other Wisconsin law?³

1. Does the petition mean Chapter 770, “Domestic Partnership”? The Wisconsin Legislature amended Wis. Stat. § 770.07(3) to cut off new domestic partnerships in the wake of *Obergefell*: “No county clerk may issue a declaration of domestic partnership to individuals who apply after April 1, 2018.” Wis. Stat. § 770.07(1)(a). Though no new declarations are issued, those issued while the statutory window was open (Aug. 3, 2009, to March 30, 2018) and not yet terminated are still valid.

³ This Court has used the term “registered domestic partner” when referring to a lawyer’s “immediate family member.” *In re Amendment to Rules Relating to Elec. Banking*, 2016 WI 21 (creating SCR 20:1.15(a)(7)). Even that term is not fully perspicacious—it implies registration under Chapter 770 but does not preclude registration with a county or municipality.

2. Does the petition mean a Chapter 40 “domestic partnership,” which was a different legal construct that applied only to state employee benefits?⁴ Again, the Legislature decided to end this option in the wake of *Obergefell*. However, the Department of Employee Trust Funds advises employees that “[i]f you are currently in a domestic partnership that was established under Chapter 40 between Jan. 1, 2010 and Sept. 22, 2017, your domestic partnership remains in force for the Wisconsin Retirement System retirement benefit administered by the Department of Employee Trust Funds.”⁵
3. Does the petition mean “an adult with whom the person resides or formerly resided”? That phrasing is drawn from the criminal statutory definition of “domestic abuse”—Wisconsin courts regularly use the term “domestic partner” to refer to such an adult. *See, e.g., State v. Grupe*, 2026 Wisc. App. LEXIS 391, *1-2 (Dist. 2

⁴ *See* Dep’t of Employee Trust Funds Memo., November 16, 2009, <https://etf.wi.gov/boards/etf/2009/12/03/writem3aiipdf/direct> (“2009 Wisconsin Act 28 contains changes to many statutes, including a new Chapter 770 regarding domestic partnership, but these provisions relate to the creation of a registered domestic partnership and the benefits flowing from a Chapter 770 domestic partnership. These provisions are not linked with the provisions regarding Chapter 40 domestic partnerships.”).

⁵ <https://etf.wi.gov/sites/default/files/publications/2019/et2166.pdf>.

April 1, 2026) (“the State charged Grupe with four counts arising out of a forcible sexual assault of a domestic partner”).

4. Does the petition cover a “domestic partner” designated in a private legal document like an insurance policy? *See, e.g., Tesch v. Hager*, 2018 Wisc. App. LEXIS 1360, *1 (Dist. 4 Oct. 1, 2018). Or an individual designated as a domestic partner for their partner’s private employer’s health insurance or benefits?
5. Does the petition cover a “domestic partner” in some way registered with a county or municipality? Approximately a dozen Wisconsin counties and municipalities offer official domestic partnership recognition under local ordinances or codes.⁶ Some municipalities may also offer a certification of domestic partners for health insurance and other benefits.⁷
6. Does the petition mean to adopt the definition of the term “domestic partner” used in the ABA’s model code of judicial conduct:

⁶ *See*

https://en.wikipedia.org/wiki/Cities_and_counties_in_the_United_States_offering_a_domestic_partnership_registry#Wisconsin.

⁷ *See, e.g.,* <https://www.cityofmadison.com/human-resources/benefits/domestic-partnership-benefits-family-partner-benefits>.

“‘Domestic partner’ means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married.” ABA Model Code of Jud. Cond. (2011 Ed.) Terminology ¶ 5.⁸

As Justice Scalia famously taught us, the rule of law requires clear rules that can be applied in the same fashion in like cases and that clearly tell the governed what the government expects. *See generally* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). The term “domestic partner” by itself does not have a clear meaning that establishes a governing rule that can guide judges and others in the application of the ethics code. The Court should decline to make this change, at minimum at this time and in this way.

Respectfully submitted,

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8

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.pdf