THE LEGAL EFFECTS OF THE PROPOSED DOMESTIC LEGAL AMENDMENT: A SUMMARY

A proposal to amend the North Carolina Constitution will be on the ballot on May 8, 2012. The proposed Amendment states “Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this state. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.”

If passed, the Amendment would not simply place this state’s current legal ban on same-sex marriage into the North Carolina Constitution. Current law simply prohibits same-sex marriage. The proposed Amendment, however, prohibits the state from recognizing or treating as valid any “domestic legal union” except heterosexual marriage. This difference in language would expand the Amendment’s impact far beyond current law. It would restrict the rights of all unmarried couples – whether they are same-sex or opposite-sex. Not only would the Amendment prohibit same-sex marriage, but it would also certainly:

- prohibit North Carolina from passing civil unions;
- bar the state from allowing unmarried couples to enter domestic partnerships, which would give them a limited range of rights to care for one another;
- ban the domestic partner insurance benefits now offered by a number of local governments to their employees, including Chapel Hill, Durham, Greensboro, and Mecklenburg and Orange Counties.

In addition, courts could interpret the language of the Amendment to ban far more rights for unmarried couples, whether they are same-sex or opposite-sex. The problem is that no one can say for certain how many more: In prohibiting state recognition or validation of “domestic legal unions,” the proposed Amendment would introduce into the Constitution a phrase whose meaning is unclear, and which has never been used in any prior statutory law in North Carolina, never been interpreted by our courts, and never been interpreted by courts in any other state. It is very possible, however, that courts will interpret the Amendment to bar the state from giving any rights to unmarried couples based on their relationships. This would:

- invalidate domestic violence protections for all unmarried partners. In Ohio, the domestic violence convictions of at least 26 batterers were dismissed or
overturned after it passed a similar amendment. (Almost three years later, the Ohio Supreme Court ultimately restored protections to unmarried partners, but only because the Ohio amendment’s language was narrower than our own.);

- undercut existing child custody and visitation rights that are designed to protect the best interests of children;
- prevent the state from giving other rights to committed couples to allow them to order their relationships, including the right to determine the disposition of their deceased partner’s remains; and to make medical decisions if their partner is incapacitated.

Furthermore, if courts interpreted it in a far-reaching manner, the Amendment could even:

- invalidate trusts, wills, and end-of-life directives by one partner in favor of the other.

It is impossible to predict definitively how broadly courts will interpret the Amendment’s prohibitions to extend, given its vague and untested language. However, two things are clear: First, it will take courts years of litigation to settle the Amendment’s meaning. Second, when the dust clears, unmarried couples will have fewer rights over their most important life decisions than they would have had otherwise.