



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

GREGORY D. STUMBO  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITOL AVENUE  
FRANKFORT, KY 40601-3449  
(502) 696-5300  
FAX: (502) 564-2894

**OAG 07-004**

June 1, 2007

*Subject:* Whether a state university's offering health insurance coverage for "domestic partners" of its employees violates Section 233A of the Kentucky Constitution

*Requested by:* Representative J. Stan Lee  
House Minority Whip

Representative Thomas J. Burch  
30<sup>th</sup> Legislative District

*Written by:* James M. Herrick  
Assistant Attorney General

*Syllabus:* State universities may extend employee health insurance coverage to "domestic partners" or any other persons, but may not condition such benefits upon a legal status defined in a manner substantially similar to that of marriage, since this would constitute the recognition of such a legal status in contravention of KY. CONST. § 233A. If domestic partnership is not defined in terms of a legal status similar to marriage, but is defined in a more inclusive manner, extending such benefits would be constitutional.

*Statutes construed:* KRS 402.005, KRS 402.010, KRS 402.020, KRS 402.030

*Constitutional provision construed:* KY. CONST. § 233A

*OAG's cited:* OAG 76-471, OAG 80-277



### *Opinion of the Attorney General*

In 2004, the voters of Kentucky adopted an amendment creating Section 233A of the Kentucky Constitution. The provision states as follows:

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

State Representatives Thomas J. Burch and J. Stan Lee, pursuant to KRS 15.025(2), have requested an opinion as to whether this section of the Constitution would prohibit a public university from extending its health insurance coverage to "domestic partners" of its faculty members and other employees.

The University of Kentucky and the University of Louisville are agencies of the Commonwealth of Kentucky, since they are state institutions of higher education pursuant to KRS 164.100 and 164.810. OAG 76-471; OAG 80-277. A public university is an arm of the state because it "operates under the direction and control of central state government [and] is funded from the State Treasury." *Withers v. University of Kentucky*, 939 S.W.2d 340, 343 (Ky. 1997). Both universities have recently announced their intentions to offer "domestic partner" health coverage as part of their efforts to remain competitive in attracting and retaining well-qualified instructors and personnel.

Since there are no published Kentucky court decisions or Attorney General opinions on point, this issue is one of first impression. We start from the premise that Kentucky's public universities, as employers, are free to make contracts extending health insurance benefits to as broad or as narrow a group of persons as they desire, so long as the classifications made (and other aspects of the contract) do not contravene any statute, regulation, or constitutional provision.<sup>1</sup> Cf. *General Electric Co. v. American Buyers Co-op., Inc.*, 316 S.W.2d 354 (Ky. 1958) (freedom of contract is included within the meaning of "liberty" in federal and state constitutions). Therefore, it is lawful under Section 233A of the Kentucky Constitution for a public university to provide domestic-partner benefits

---

<sup>1</sup> We additionally recognize that an entitlement to health insurance coverage is not an inherent right or benefit of marriage, but is a privilege voluntarily granted by an employer.

unless, in so doing, the university in effect "recognize[s]" a "legal status identical or substantially similar to that of marriage for unmarried individuals."

It has been argued by the University of Louisville that the second clause of Section 233A is only intended to prevent the creation, by the General Assembly or perhaps by judicial ruling, of "civil unions" under which unmarried couples would be accorded the same rights and benefits the law provides to married persons. Although that purpose is within the scope of the clause, the prohibition is expressed more broadly, so as to restrain contrary governmental action in general. Cf. *Ownbey v. Morgan*, 256 U.S. 94, 111 (1921) (due process clause "restrains state action, whether legislative, executive, or judicial").

"The fundamental purpose in construing a constitutional provision is to ascertain the intention of the framers and the people in adopting it." *Meredith v. Kauffman*, 293 Ky. 395, 169 S.W.2d 37, 38 (1943). In so doing, we "may not shape [our] course by the exigencies of the situation but must give such effect to the plain, unambiguous terms of the section as will carry out its manifest purpose regardless of the result." *City of Louisville v. German*, 286 Ky. 477, 150 S.W.2d 931, 935 (1940). Accordingly, we consider the meanings of the various terms used in Section 233A.

### **"Recognized"**

Both universities have pointed out, in defense of their policies, that extending insurance benefits does not "create a legal status." This is true as far as it goes, but the language of Section 233A prohibits the state not only from creating, but also from "recogniz[ing]," a legal status. To recognize means "to acknowledge by admitting to a privileged status." *Price v. U.S.*, 100 F.Supp. 310, 316 (Ct.Cl. 1951) (internal quotation omitted).

"Recognize" is a term often used in the law but seldom defined. Under Kentucky law, the "recognition" of a marital status evidently includes an acknowledgment of some effect upon a right or benefit. Thus, in *Gilbert v. Gilbert*, 275 Ky. 559, 122 S.W.2d 137, 139 (1938), the former Court of Appeals stated: "Kentucky does not recognize a common-law marriage except in applying section 4894 of the Workmen's Compensation Act." In a previous case, the Court had likewise noted:

Common-law marriages, as such, are not recognized in Kentucky. However, in applying section 4894 of the Statutes, it has been necessary for us to apply rules in determining the status in the same manner as if such marriages were accepted as legal for all purposes.

*Edgewater Coal Co. v. Yates*, 261 Ky. 335, 87 S.W.2d 596, 597 (1935). The statute at issue, KS 4894, provided that “[c]ompensation to any dependent shall cease at the death or legal or common-law marriage of any dependent.” (Quoted in *Elkhorn Coal Corp. v. Tackett*, 243 Ky. 694, 49 S.W.2d 571, 572 (1932).)

It is instructive that the Court in *Gilbert* spoke of “recognizing” the status of common-law marriage for a limited purpose only, not necessarily for all purposes. In *Gilbert* and *Edgewater Coal*, the status was “recognized” as having an effect upon the termination of workers’ compensation benefits, even though it was not “recognized” for all purposes. Accordingly, whenever the government causes a benefit to depend upon a status, the status is “recognized.” A public employer that conditions a privilege upon proof of a certain status has “recognized” that status. *National Pride at Work, Inc. v. Governor of Michigan*, \_\_\_ N.W.2d \_\_\_, 274 Mich. App. 147, 2007 WL 313582 (Mich. App. 2007), *appeal granted*, \_\_\_ N.W.2d \_\_\_, 2007 WL 1492422, 1492454 (Mich. 2007). We must, therefore, ascertain what constitutes recognition of a “legal status ... substantially similar to that of marriage.”<sup>2</sup>

#### “Legal status”

The universities maintain that recognizing a “legal status ... substantially similar to marriage” would have to include recognition of all (or nearly all) of the rights, benefits, duties, and obligations of marriage. A threshold issue, however, is whether “legal status” in this context consists of the benefits and obligations that the law confers upon the status holder, or of the characteristics by which the law defines eligibility for that status. We believe the latter is the correct view. The rights, benefits, duties, and obligations of marriage do not constitute the

---

<sup>2</sup> *Lowe v. Broward Co.*, 766 So.2d 1199 (Fla. App. 4 Dist. 2000), is not on point here because the Florida court was concerned with whether domestic partnerships were “relationships between persons of the same sex which [were] treated as marriages.” *Id.* at 1207. The language of Section 233A is not limited to same-sex relationships or to treatment of any relationships “as marriages.”

legal status of marriage; rather, they are consequent upon the legal status of marriage.

"[M]arriage is a civil status arising out of a civil contract." *Johnson v. Sands*, 245 Ky. 529, 53 S.W.2d 929, 930 (1932). It has been held that in its legal sense "a 'status' means a legal personal relationship ... with which third persons and the State are concerned." *Holzer v. Deutsche Reichsbahn Gesellschaft*, 290 N.Y.S. 181, 191 (N.Y. Sup. 1936), *aff'd in part, modified in part*, 14 N.E.2d 798 (1938) (quoting REST. (2D) CONFLICT OF LAWS, § 119). The word "status," as applied to relationships such as parent and child or husband and wife, is not synonymous with "right," but "may be considered a synonym for 'relationship,'" so that any rights attached to the status are severable from the status itself. *Calhoun v. Bryant*, 133 N.W. 266, 271 (S.D. 1911). The South Dakota court in *Calhoun* analyzed this distinction at length:

The word "status" is perhaps more frequently used in connection with the marriage relation than any other. It seems always, or nearly always, used to express or recognize a certain "relationship." It is said that a marriage valid in the state where consummated, and not contrary to the policy or laws of another state, fixes or establishes the "status" of the parties to the contract of marriage everywhere—that the relationship or "status" thus established is universally recognized. But suppose a man and woman marry in a state whose laws give the wife only a right of dower in her husband's real property; the husband, a resident of that state at the time of his death, owning real property in this state. Would it be contended that, because the law of the state in which the marriage took place fixed the "status" of the parties, the wife could take only a dower interest in her deceased husband's real property in this state? Yet the dower right is an incident of the marriage contract under the law of the state where consummated, and the law of that state is ordinarily said to have fixed the "status" of the parties. We believe a substantially correct statement of the proposition is that the law of the state where the marriage is consummated establishes the "relationship" of one to the other as husband and wife or parent and child which is universally recognized, but that the mere incidents flowing from that "status" or relationship are controlled by

the law of the domicile of the parties or the *situs* of the property. The interest of the wife in the husband's property, whether she take as heir or otherwise, is wholly a creation of statute law precisely as is the right of inheritance between parent and child natural or adoptive, and we see no reasonable ground for distinction between the two as to the principle under discussion.

*Id.*

"Recognition" of a "substantially similar legal status" to marriage, then, need not imply recognizing any substantial proportion of the rights and obligations conferred upon married persons under existing law. If the standard were of that nature, it would have to be subject to continual reappraisal whenever statutes affecting the rights of married persons were amended, enacted, or repealed. Moreover, and more importantly, allowing a limited recognition of a similarly-defined relationship to marriage for some purposes, provided only that it were not extended to all subject matters at the same time, would enable various state agencies within their separate spheres of competence to accomplish piecemeal by the sum of their efforts what the legislature could not. "What the Legislature cannot do directly it cannot do indirectly through the agency of one of its creations." *McCracken Co. v. Reed*, 31 Ky.L.Rptr. 31, 101 S.W. 348, 349 (1907).

It is highly relevant, therefore, whether a public university in extending eligibility for health benefits is conditioning that eligibility upon the recognition of a legal status substantially similar to that of marriage. We turn first, therefore, to the legal characteristics of marriage.

Marriage in the Commonwealth of Kentucky is purely statutory. *Cecil v. Farmers Nat'l Bank*, 245 S.W.2d 430 (Ky. 1952). The legal status of marriage in Kentucky is defined and delimited by various provisions of KRS Chapter 402. Among these are the following:

**KRS 402.005**

As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the

community of the duties legally incumbent upon those whose association is founded on the distinction of sex.

**KRS 402.010**

- (1) No marriage shall be contracted between persons who are nearer of kin to each other by consanguinity, whether of the whole or half-blood, than second cousins.
- (2) Marriages prohibited by subsection (1) of this section are incestuous and void.

**KRS 402.020(1)**

Marriage is prohibited and void:

- (a) With a person who has been adjudged mentally disabled by a court of competent jurisdiction;
- (b) Where there is a husband or wife living, from whom the person marrying has not been divorced;
- (c) When not solemnized or contracted in the presence of an authorized person or society;
- (d) Between members of the same sex; [or]
- (e) Between more than two (2) persons....

KRS 402.020(1)(f) and 402.030, which immediately follow the subsections quoted above, are addressed to the age of consent for marriage, which, depending on parental consent, is either 16 or 18 years except in case of pregnancy.

**“Substantially similar”**

The recognition of a legal status for unmarried individuals may violate Section 233A if it is either identical or “substantially similar” to that of marriage. “Similar” means “nearly corresponding, resembling, having a general likeness.” *Kentucky Utilities Co. v. City of Paris*, 297 Ky. 440, 445, 179 S.W.2d 676, 679 (1944). The term has elsewhere been defined as meaning “of a like nature or kind ... or nearly corresponding; resembling in many respects; somewhat like; having a general likeness.” *Com. ex rel. Shaffer v. Shaffer*, 103 A.2d 430 (Pa. Super. 1954) (internal quotation omitted). “Similar,” therefore, denotes a general resemblance amounting to less than being the same.

The adverb “substantially,” which modifies “similar” in Section 233A, has been analyzed in the following terms (in the context of the phrase “substantially the same”):

This Court believes that plaintiff misunderstands the word ‘substantially.’ It does not mean identical or ‘the same’; it means less than this. ‘Substantially’ means in substance; in the main; essentially, by including the material or essential parts.... The word ‘substantially’ is a relative term and should be interpreted in accordance with [the] context ... in which it is used.

*Darlington v. Studebaker-Packard Corp.*, 191 F.Supp. 438, 439 (N.D. Ind. 1961) (citations omitted). “Substantially similar,” then, means similar in substance or similar in material or essential parts.<sup>3</sup> Accordingly, in keeping with the meaning of “similar,” a legal status with a general likeness to the basic elements of marriage would be substantially similar to the legal status of marriage.

We are further guided by the Franklin Circuit Court’s ruling in *Wood v. Com.*, No. 04-CI-01537 (May 26, 2005) (appearing on Westlaw at 2005 WL 1258921), an action in which the 2004 amendment was upheld against a claim that it unlawfully related to more than one subject. The court in that case interpreted the second clause of Section 233A in accordance with the arguments of the defendants, who characterized it as prohibiting the recognition of “marriage imitations or substitutes.” 2005 WL 1258921 at \*5. The Franklin Circuit Court thus found that the two clauses of the amendment were germane to a common subject, as opposed to being “essentially unrelated to one another.” *Id.* at \*7. The common import of Section 233A is that only marriage as defined in Kentucky law, and not an imitation or substitute, shall be valid or recognized as a legal status.

### “Domestic partnership”

---

<sup>3</sup> See also *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100 (6<sup>th</sup> Cir. 1989) (“substantially similar” prior accidents in a products liability case are accidents occurring under similar circumstances or sharing the same cause).

A comparison of such terms as "civil union" and "domestic partnership" in a legal vacuum is not useful, since any such status has reality only insofar as it is defined by the entity recognizing it.<sup>4</sup> It is necessary, therefore, to examine the manner in which the University of Kentucky and the University of Louisville have defined "domestic partnership."

As described on the University of Louisville's website,<sup>5</sup> eligibility for "domestic partner" coverage is defined as follows.

A domestic partner relationship meets these criteria:

- The parties are each other's sole domestic partner and intend to remain so indefinitely.
- Neither party is legally married to anyone else.
- Both parties [are] age 18 or older and mentally competent to consent.
- The parties are not related by blood to a degree that would prohibit legal marriage in the state where they legally reside.
- The parties have been living together as a couple and share a residence and have done so for at least six consecutive months prior to this declaration.
- At least six months have passed since either party terminated any previous domestic partnership.
- The parties are jointly responsible for each other's common welfare and share financial obligations which could be demonstrated upon request by providing proof of existence of at least one of the following:
  - A joint mortgage or lease or other evidence of common residence such as joint utility bills
  - Durable property or health care power of attorney
  - Joint ownership of a motor vehicle

---

<sup>4</sup> "Domestic partnership," for example, could refer to the kind of joint venture recognized in *Glidewell v. Glidewell*, 790 S.W.2d 925 (Ky.App. 1990), and *Akers v. Stamper*, 410 S.W.2d 710 (Ky. 1966).

<sup>5</sup> <http://louisville.edu/admin/humanr/enrollment/plan/eligibility/domesticpartners.html> contained this information as of May 15, 2007.

- Joint checking account/credit account
- Designation of each other as the primary beneficiary in a will, life insurance policy, or retirement plan

A related page on the University of Louisville's website<sup>6</sup> answers the question "Who can be covered under U of L insurance benefits?" by responding: "Employees, spouses & domestic partners, dependent children, retirees, surviving spouses and COBRA participants."

The University of Kentucky has provided this Office with a copy of its proposed Affidavit of Domestic Partnership. Among the matters to which domestic-partner applicants must attest are the following:

1. We are each other's sole domestic partner, and have been in this relationship for at least six (6) months.
2. Neither of us is currently married to or legally separated from another person, as recognized by the laws of the Commonwealth of Kentucky.
3. We are both eighteen (18) years of age or older, and mentally competent to consent.
4. We are not related by blood to a degree that would prohibit legal marriage in the state where we legally reside.
5. We are in a close and committed relationship of mutual financial and emotional support, and intend to remain in the relationship.
6. We understand that domestic partners are subject to the same window period governing other employees who are covered by or applying for benefit plan coverage. Any children, new employment, adoptions, new marriages and domestic partnerships are all subject to a thirty (30) day limit on the enrollment period beginning on the date of the event.
7. We are jointly responsible for each other's common welfare, and our shared financial obligations may be demonstrated by the existence of the following documents, at least one (1) of which demonstrates our shared obligations during a period of at least six (6) months preceding the execution of this declaration. We have circled below the types of

---

<sup>6</sup> <http://louisville.edu/admin/humanr/enrollment/plan/> as of May 15, 2007.

documentation submitted with this form. We understand that this *Affidavit* will not be processed without the documentation.

At least TWO (2) of the following:

- A. evidence of a common household or shared address (may include address on tax returns, driver's license, household bills, lease agreement, public assistance documents);
- B. bank statement indicating joint ownership of a checking or savings account, or authorized signatory authority on the other's bank account;
- C. evidence of joint obligation on an automobile loan or joint ownership of a motor vehicle;
- D. ownership of a joint credit card, or authorized signatory authority on the other's credit card;
- E. evidence of other joint responsibility, such as child care (e.g. school documents)

**AND**

At least ONE (1) of the following:

- A. beneficiary designation (primary or secondary) under the other's life insurance policy, retirement benefits account or IRA, or will;
- B. documents demonstrating that one is executor of the other's will;
- C. power of attorney for health care or financial management;
- D. a jointly held mortgage or home ownership;
- E. adoption papers or legal guardianship demonstrating shared responsibility for minor children;
- F. evidence one is claimed as a dependent on the other's federal tax return

(Emphasis in original.)<sup>7</sup>

There is nothing constitutionally objectionable about the majority of the material quoted from the University of Kentucky's proposed affidavit. Items 2,

---

<sup>7</sup> We note in passing that neither university draws a distinction between domestic partners of the same sex and those of opposite sexes. This fact does not affect our legal analysis in light of the broad language of Section 233A .

3, and 4, however, are of particular concern. Item 2 is similar in substance to subsections (b) and (e) of KRS 402.020(1), which respectively prohibit marriage of a person already married and marriage between more than two persons.<sup>8</sup> See also *Elkhorn Coal Corp. v. Tackett*, 243 Ky. 694, 49 S.W.2d 571 (1932) (only one marriage contract may exist at the same time).

Item 3 generally parallels the age requirement for marriage in the absence of parental consent under KRS 402.020(1)(f), as well as the mental capacity required by KRS 402.020(1)(a). A party must have the mental competence to understand the nature of the duties and obligations of the married state in order to contract a valid marriage. *Johnson v. Sands, supra*.

Item 4, meanwhile, explicitly makes reference to the consanguinity prohibitions applying to marriage under KRS 402.010. A marriage between persons related within the statutory degrees is void *ab initio*. *Ex parte Bowen*, 247 S.W.2d 379 (Ky. 1952). All of these criteria, items 2 through 4 in the affidavit, expressly define "domestic partner" in terms closely resembling the legal conditions for the status of marriage.

The same three items from the University of Kentucky's proposed affidavit appear on the bulleted list of qualifications issued by the University of Louisville, in essentially the same terms, but with one addition. This addition, the University of Louisville's reference to "living together as a couple," is reminiscent of the "cohabitation" element of common-law marriage in many jurisdictions that recognize such a status.<sup>9</sup> See, e.g., *In re Marriage of Martin*, 681 N.W.2d 612 (Iowa 2004); *In re Marriage of Geertz*, 755 P.2d 34 (Mont. 1988); *In re Estate of Buttrick*, 597 A.2d 74 (N.H. 1991); *In re Miller's Estate*, 78 P.2d 819 (Okla. 1938); *Bobbitt v. Bobbitt*, 223 S.W. 478 (Tex. Civ. App. 1920); *State v. Green*, 99 P.3d 820 (Utah 2004) (interpreting Utah statute on unsolemnized marriages).

---

<sup>8</sup> The condition of not being married is an element of legal status, in the same sense in which marriage itself is a legal status. "A condition as to marriageability, is a status in the proper sense." *In re Rogers' Will*, 146 N.W. 488, 491 (Wis. 1914) (Marshall, J., concurring).

<sup>9</sup> Kentucky does not recognize common-law marriages, *Spears v. Com.*, 253 S.W.2d 566 (Ky. 1954), except for those which have been solemnized in a jurisdiction where they are valid and which are not against Kentucky's public policy. KRS 402.040(1). A common-law marriage properly solemnized in another state would simply be recognized as a marriage in Kentucky, *Brown's Adm'r v. Brown*, 308 Ky. 796, 215 S.W.2d 971 (1948), and there would be no need to recognize a "domestic partnership" in such a case.

Mere cohabitation, in the broad sense of sharing a residence, is constitutionally indifferent in and of itself. Nevertheless, if "living together as a couple" (emphasis added) is recognized as part of a legal status for unmarried individuals, in conjunction with the other elements resembling marriage (Items 2 through 4), it further indicates an intent on the part of the university to recognize an imitation or substitute for marriage. Nor is it entirely irrelevant that cohabitation, when concerned with marital relations, has often been construed as including or implying sexual activity. See, e.g., *Capper v. Capper*, 451 So.2d 359 (Ala. Civ. App. 1984); *State v. Smith*, 47 N.E. 685 (Ind. App. 1897); *In re Marriage of Harvey*, 466 N.W.2d 916 (Iowa 1991); *Herrman v. Herrman*, 156 N.Y.S. 688 (N.Y.Sup. 1916), *aff'd*, 162 N.Y.S. 1123 (N.Y.A.D. 1<sup>st</sup> Dept. 1917); *Bowlin v. State Acc. Ins. Fund Corp.*, 726 P.2d 1186 (Or.App. 1986); *E.D.M. v. T.A.M.*, 415 S.E.2d 812 (S.C. 1992); *Tarr v. Tarr*, 35 S.E.2d 401 (Va. 1945); *De Berry v. De Berry*, 177 S.E. 440 (W.Va. 1934). It need hardly be mentioned that conjugal relations are considered among the essentials of marriage.<sup>10</sup>

If the universities did not intend to recognize, with "domestic partnership," an imitation or substitute for the legal status of marriage, there would be no rational basis for prohibiting domestic partners from possessing the same degree of consanguinity that would legally invalidate a marriage. Likewise, if their qualifying criteria were not recognizing a substitute for marriage, there would be no reason to prohibit a married or legally separated person from being a domestic partner. Furthermore, given this context and the fact that nothing more is at issue than insurance coverage, the requirements that both partners be over the age of 18 and mentally competent to enter a contract appear to constitute nothing more than an imitation of requirements for eligibility for the status of marriage.

In striking down comparable domestic-partner plans under an analogous provision of Michigan's constitution, the Court of Appeals of Michigan identified the same factors embodied in Items 2 through 4 of the University of Kentucky's affidavit, but the court additionally identified "agreement" as another pertinent element because it resembled the "consent" element found in Michigan's statutory requirements for a marriage. *National Pride at Work*, *supra*, 2007 WL 313582,

---

<sup>10</sup> See generally *Corrigan v. Corrigan*, 305 Ky. 695, 699, 205 S.W.2d 495, 497 (1947) (continuation of unexpectedly celibate marriage for "even 1 year" regarded as "unnatural and improbable").

at pp. 6-7. The marriage relation in Kentucky is likewise a status founded in contract or consent. *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973); *Elkhorn Coal Corp. v. Tackett*, *supra*. Although Kentucky's marriage statutes do not literally refer to "consent," KRS 402.030(1) does list as voidable "any marriage obtained by force or fraud." Therefore, although recognizing an agreement between domestic partners in and of itself would not be unconstitutional, in connection with the three restrictions approximating the legal prohibitions on marriage it constitutes a further indication that the universities are recognizing a legal status substantially similar to marriage.

In addition to this, the exclusivity and quasi-permanence of the domestic partnership ("We are each other's sole domestic partner"; "The parties are each other's sole domestic partner and intend to remain so indefinitely"), while not objectionable when taken alone, tend (in the context of the other provisions) to suggest the exclusive and permanent aspects of the legal status of marriage under KRS 402.005 and 402.020. Certainly there would be no reason why the universities could not constitutionally limit an employee to a single "domestic partner," if other elements of the definition of that relationship did not already bear a substantial resemblance to the legal status of marriage. In light of the totality of the circumstances, however, the requirement of an exclusive and permanent relationship and the restrictions placed upon the will of the parties in changing domestic partners (the six-month waiting period) merely serve as added indicia of the recognition of a similar legal status.

Another detail we have not failed to notice is the manner in which the University of Louisville enumerates its list of qualifying individuals for insurance benefits: "Employees, spouses & domestic partners, dependent children, retirees, surviving spouses and COBRA participants." (Emphasis added.) The fact that "spouses" is joined to "domestic partners" by an ampersand, rather than separated by a comma, further suggests that the University of Louisville has recognized those two relationships as being substantially similar in a way not shared by the other items in the list.

It is not insignificant that both universities' definitions of "domestic partner" correspond closely to the statutory definitions adopted by some jurisdictions that have created such a legal status through legislation. Maine, for instance, requires a domestic partner to be "a mentally competent adult ... not

impaired or related in a fashion that would prohibit marriage," with both partners "legally domiciled together for at least 12 months," additionally mandating that neither partner be "married or in a registered domestic partnership with another person," but that each be "the sole domestic partner of the other and expect[] to remain so." 22 ME. REV. STAT. ANN. § 2710. California defines domestic partners in terms of sharing "a common residence," not being "married to someone else or ... a member of another domestic partnership," not being "related by blood in a way that would prevent them from being married to each other," and being "at least 18 years of age" and "capable of consenting to the domestic partnership." CAL. FAMILY CODE § 297.<sup>11</sup> If a university employee possessing statutory domestic-partner status in one of these jurisdictions were to migrate to Kentucky, the effect of the health insurance coverage terms would be essentially to "recognize" that "legal status," to the extent that the university was capable of doing so.

We are sensitive to the policy objectives of Kentucky's public universities, both in their need to attract qualified staff and in their desire to be munificent with their health benefits by adopting a broader conception of membership in an employee's household. It is necessary, nonetheless, that these goals be achieved in a manner that does not violate the intent of Section 233A.

The constitutional infirmity of the universities' domestic partner coverage lies in the fact that the plan is too exclusive in defining the class of beneficiaries. While an entirely unrelated person cohabiting with the employee can receive benefits as a "domestic partner," a cousin, sister, or nephew who may in fact live as a full member of the employee's household and otherwise qualify as a domestic partner must be denied coverage. In like manner, whereas an unmarried person engaging in a sexual relationship with the employee could qualify, a close friend who happened to have an estranged or abusive spouse could not.

The contours of the definition, far from suggesting a broad and inclusive availability of health insurance for a *bona fide* member of the employee's household, instead indicate a narrowly focused attempt to recognize in "domestic partnership" an imitation or substitute for the marital relationship. In effect, the

---

<sup>11</sup> California also extends to domestic partners all of "the same rights, protections, and benefits, and ... the same responsibilities, obligations, and duties under law, ... as are granted to and imposed upon spouses." CAL. FAMILY CODE § 297.5.

universities have placed unconstitutional conditions on health insurance coverage for domestic partners, since the benefit is premised upon the recognition of a legal status in the two individuals that is substantially similar to marriage.

If "domestic partner" were defined in a more general manner, not so delimited as to resemble a tailored alternative to the legal status of marriage, there would be nothing in Section 233A to prevent Kentucky's public universities from offering this coverage. Alternatively, the universities could elect to offer health insurance benefits to all of an employee's dependents, or to use any other approach that would not involve the unconstitutional recognition of a legal status resembling that of marriage.

We reiterate that public universities in Kentucky are able to extend their employee health insurance coverage to include as many persons as they wish. The only limitation posed by Section 233A is that qualification for the benefit must not be restricted to a status substantially similar to marriage for unmarried individuals. Accepting as a "domestic partner" any member of an employee's household—married or unmarried, related or unrelated—with whom the employee has an interdependent financial relationship, evidenced by the type of documentation already required by the existing domestic-partner affidavits, would be one permissible approach to accomplishing the universities' goals in a more inclusive manner. This could encompass, but would not be limited to, the types of relationships contemplated by the universities' current coverage scheme.

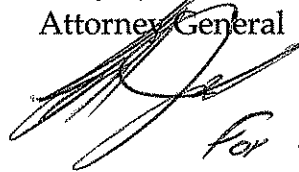
## **Conclusion**

It is not this Office's purpose to express approval or disapproval of the underlying policy choices made by the University of Kentucky or the University of Louisville in extending health insurance benefits to domestic partners of employees. A public university is at liberty to take notice of "close and committed relationship[s] of mutual financial and emotional support." The Kentucky Constitution, however, prevents any state agency from recognizing a legal status for unmarried persons that is "substantially similar to that of marriage."

Accordingly, it is our opinion that domestic-partner status, as the universities have defined it, cannot be constitutionally recognized as a condition for public employee benefits. The universities could remedy this constitutional

deficiency in their coverage schemes by deleting the qualifications of unmarried status, absence of consanguinity, age, and capacity to contract.

Gregory D. Stumbo  
Attorney General



*For James M. Herrick*

James M. Herrick  
Assistant Attorney General