WISCONSIN LEGISLATIVE COUNCIL

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TO: REPRESENTATIVE ANDRE JACQUE

FROM: Anna Henning AH, Staff Attorney

RE: Implications of 2011 Assembly Joint Resolution 77 With Respect to s. 940.04, Stats., and the Legal Framework Governing Repeals of Statutes by Implication

DATE: December 2, 2011

This memorandum responds to your request for an analysis of whether the constitutional amendment proposed in 2011 Assembly Joint Resolution 77, if it became effective, would repeal s. 940.04, Stats., which provides criminal penalties relating to harm to unborn children. The memorandum briefly describes the proposed constitutional amendment, s. 940.04, Stats., and current limitations on the enforcement of the statute. It then discusses statutory interpretation principles and case law applicable to your question.

PROPOSED CONSTITUTIONAL AMENDMENT

2011 Assembly Joint Resolution 77 proposes an amendment to art. I, s. 1, Wis. Const., for first consideration by the Wisconsin Legislature.[1] Article I, Section 1 of the Wisconsin Constitution currently provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The proposed amendment removes the word "born" from the first clause of art. I, s. 1. As amended, the clause would read: "All people are equally free and independent...." The proposed amendment also adds the following sentence at the end of the current text of art. I, s. 1: "As applied to the right to life, the terms 'people' and 'person' shall apply to every human being at any stage of development."

[1] To become effective, amendments to the Wisconsin Constitution must be adopted by two successive Legislatures and ratified by voters in a statewide referendum. [Wis. Const. art. XII, s. 1.] The initial vote by a Legislature regarding a proposed amendment is referred to as "first consideration."

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SECTION 940.04, STATS.

Section 940.04, Stats., provides a basis of criminal liability for various types of conduct relating to harm to an "unborn child," defined to mean "a human being from the time of conception until it is born alive." [s. 940.04 (6), Stats.] Specifically, the statute provides for criminal penalties as follows:

- Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.[2]
- Any person, other than the mother, who either intentionally destroys the life of an unborn quick child[3] or causes the death of the mother by an act done with intent to destroy the life of an unborn quick child is guilty of a Class E felony.[4]
- Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than $200 or imprisoned not more than six months, or both.
- Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another is guilty of a Class I felony.[5]

[s. 940.04 (1) through (4), Stats.]

The statute provides an exception to criminal liability with regard to a therapeutic abortion,[6] provided that the abortion is all of the following:

- Performed by a physician.
- Necessary, or advised by two other physicians as necessary, to save the life of the mother.
- Performed in a licensed maternity hospital, unless an emergency prevents the procedure from being performed there.

[s. 940.04 (5), Stats.]

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[2] A Class H felony is punishable by a fine not to exceed $10,000 or imprisonment not to exceed six years, or both. [s. 939.50 (3) (h), Stats.]

[3] The term "unborn quick child" is not defined in the Wisconsin statutes. At common law, the term refers to the stage of development evidenced by movement of the fetus. [See *State v. Timm*, 12 N.W. 2d 670, 671 (Wis. 1944).] In other contexts, the term has been used to refer to a baby that would be viable outside of the mother's body with reasonable medical assistance, similar to the definition for the term "viability" under s. 940.15 (1), Stats.

[4] A Class E felony is punishable by a fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both. [s. 939.50 (3) (e), Stats.]

[5] A Class I felony is punishable by a fine not to exceed $10,000 or imprisonment not to exceed three years and six months, or both. [s. 939.50 (3) (i), Stats.]

[6] The term "therapeutic abortion" is not defined in the Wisconsin statutes. In other contexts, the term generally refers to an abortion performed for the purpose of saving the mother's life.

CURRENT LIMITATIONS ON THE ENFORCEMENT OF S. 940.04, STATS.

To the extent that it violates restrictions on government regulation of abortion under the U.S. Constitution, s. 940.04, Stats., is currently unenforceable.[7] In addition, two other sections of the Wisconsin statutes, ss. 940.13 and 940.15, were enacted after s. 940.04 and may be found to conflict with and supersede one or more of its provisions.[8]

Section 940.13, Stats., prohibits the prosecution and imposition of criminal penalties against a woman who obtains an abortion or otherwise violates any provision of any abortion statute with respect to her unborn child or fetus. It does not appear that s. 940.13, Stats., could be reconciled with the provisions of s. 940.04, Stats., that impose criminal penalties on a woman who destroys the life of her unborn child.

Section 940.15, Stats., provides criminal penalties for performing an intentional abortion after the fetus or unborn child reaches viability and provides an exception where an abortion is necessary to preserve the life or health of the mother. In *State v. Black*, 526 N.W.2d 132 (1994), the Wisconsin Supreme Court rejected the argument that s. 940.15, Stats., impliedly repealed (see the discussion below) the provision of s. 940.04, Stats., that proscribes the intentional destruction of an unborn quick child by a person other than the child's mother. In order to reconcile the two statutes, the court interpreted the relevant provision of s. 940.04, Stats., as being inapplicable to the performance of abortions.

DISCUSSION

Use of "Implied Repeal" in Statutory Interpretation

The concept of "implied repeal" is a tool of statutory interpretation. Courts typically utilize the concept to resolve conflicts between inconsistent statutory provisions, particularly in situations where a later-enacted statute does not expressly repeal a provision of current law with which it directly conflicts. In such situations, a court may find that a statute has been impliedly repealed by the subsequently enacted statute.

However, courts generally disfavor findings of repeal by implication. [See *Hui v. Castaneda,* 130 S. Ct. 1845, 1853 (2010). ("As we have emphasized, repeals by implication are not favored and

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[7] As interpreted in *Roe v. Wade*, 410 U.S. 113 (1973), and subsequent cases, the U.S. Constitution prohibits a state from preventing any woman from making the ultimate decision to terminate her pregnancy before a baby is viable or imposing an undue burden upon a woman's right to make that decision. However, a state may create a "structural mechanism" by which the state, or the parent or guardian of a minor, may express profound respect for the life of an unborn child, if the mechanism is not a "substantial obstacle" to a woman's exercise of the right to choose to have an abortion. [*Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).] Prior to *Roe*, a federal district court held that specific prosecutions under s. 940.04, Stats., were prohibited under the U.S. Constitution. [*Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970).]

[8] When two statutes cannot be reconciled, the general principle of statutory construction is that courts will try to harmonize them such that both statutes may be given effect. However, if two statutes cannot be harmonized, courts will apply the tool of "implied repeal," described below, to give effect to the later-enacted statute. [See *State ex rel. Mitchell v. Superior Court of Dane County*, 109 N.W.2d 522, 524 (Wis. 1961).]

will not be presumed unless the intention of the legislature to repeal is clear and manifest.")] For that reason, a court may choose to adopt an interpretation that limits the scope of a given provision in order to avoid a finding of implied repeal.

Legal Framework Under "Kayden Industries v. Murphy"

Because there is no question that a constitutional provision governs over a statutory provision, the term "implied repeal" is not frequently used to describe the effect of a constitutional provision on a statute.[9] However, in *Kayden Industries v. Murphy*, 150 N.W.2d 447 (Wis. 1967), the Wisconsin Supreme Court employed an analogous framework to hold that a statute had been repealed by a conflicting constitutional amendment.

In *Kayden*, the court drew a distinction between self-executing and non-self-executing constitutional amendments, defining self-executing amendments as those for which "no legislation is necessary to give effect" to the amendments. With regard to a self-executing constitutional amendment, the *Kayden* court noted that the "established rule" is that such an amendment "repeal[s] inconsistent statutes and common law which arose under the constitution before the amendment." [*Id.* at 453.] In contrast, the court implied that constitutional amendments that require enabling legislation do not repeal inconsistent statutory provisions automatically upon taking effect.

Although the Wisconsin Supreme Court has reaffirmed the *Kayden* holding (see, e.g., *State v. Gonzales*, 645 N.W.2d 264, 268 (2002)), it has not relied upon it in any subsequent decision. Thus, the extent to which a court would apply the *Kayden* framework to the amendment proposed in 2011 Assembly Joint Resolution 77 is somewhat unclear. If a court were to apply *Kayden*, it would presumably engage in a two-fold inquiry to determine whether the proposed constitutional amendment repeals s. 940.04, Stats., upon taking effect: First, is the amendment self-executing? Second, if so, is the statute inconsistent with the amendment?

Self-Execution

In *Kayden*, the Wisconsin Supreme Court held that "constitutional amendments which deal with the substantive law of the state are presumed self-executing." [*Kayden*, 150 N.W.2d at 453.] It added that constitutional amendments should be considered to be self-executing "unless the language is ambiguous or legislative action is required to give effect to the constitutional provision."

The Wisconsin Supreme Court does not appear to have examined whether any state constitutional amendment is "self-executing" since the *Kayden* decision. In *Kayden*, the court examined an amendment that created a set of exceptions to the constitutional provision prohibiting legislative authorization of any lottery. Specifically, the amendment allowed legislative authorization of a lottery in the following circumstances: "Except as the legislature may provide otherwise, to listen to or watch a

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[9] For example, *Heaton v. Independent Mortuary Corp.*, 294 N.W.2d 15 (Wis. 1980), involved the question of whether a constitutional amendment that created a state court of appeals, and subsequent implementing legislation, impliedly repealed an existing statute governing the right of appeal in cases dismissed for lack of personal jurisdiction. The Wisconsin Supreme Court held that the existing statute had been repealed by implication, but its analysis focused on the apparent conflict between the new implementing statute and the existing statute, rather than the constitutional amendment.

television or radio program, to fill out a coupon or entry blank, whether or not proof of purchase is required, or to visit a mercantile establishment or other place without being required to make a purchase or pay an admittance fee does not constitute consideration as an element of a lottery." The court held that the amendment was self-executing because it effected a change in substantive law, and there was no ambiguity in the literal terms of the provision requiring judicial interpretation. [*Id.*, at 453-54.]

The constitutional amendment proposed in 2011 Assembly Joint Resolution 77 arguably includes more ambiguous terms than did the amendment at issue in *Kayden*. On the other hand, it does not appear to necessarily contemplate that legislation is necessary to implement or give effect to it. Thus, it is possible that a court would apply the presumption in favor of finding self execution to hold that the amendment is self-executing. However, given the sparse case law employing the *Kayden* framework, it is impossible to predict with any certainty how a court would resolve that question.

Inconsistency

Likewise, it is difficult to predict how a court might rule regarding the question whether s. 940.04, Stats., is inconsistent with the proposed constitutional amendment. When determining whether a given statute is inconsistent with a constitutional provision, Wisconsin courts generally presume that the statute is not inconsistent, unless the party challenging the statute proves otherwise. [*State v. Cole*, 665 N.W.2d 328, 333-36 (2003).] In the absence of a judicial decision regarding the question, it is difficult to predict whether the presumption of constitutionality could be overcome with regard to s. 940.04, Stats. On one hand, the statute appears to complement rather than conflict with the proposed constitutional amendment, insofar as the amendment expands the inherent right to life recognized in the Wisconsin Constitution to unborn persons and the statute provides a basis for criminal liability for harm to such persons.

On the other hand, it is possible that one or more provisions of s. 940.04, Stats., may be viewed as inconsistent with the change made by the proposed constitutional amendment to the state's Equal Protection Clause or to the constitutional guarantee of an inherent right to life. For example, the exception for therapeutic abortions contained in the statute might arguably be interpreted to conflict with the amended constitutional guarantee of equality, particularly because it may be interpreted as unconstitutionally differentiating between an unborn child aborted for the purpose of saving the life of the mother and an unborn child whose mother's life is not in danger. In addition, provisions of the statute that provide unique penalties for harm to an unborn quick child may arguably also create an unconstitutional distinction between a viable fetus and an unborn child at an earlier stage of development.

Thus, if a court were to apply the *Kayden* holding, it is possible, but not certain, that the proposed constitutional amendment, if ratified, may be found to repeal one or more provisions of s. 940.04, Stats. Given the presumption against a finding of inconsistency, it does not appear that a court would be likely to hold that the proposed constitutional amendment impliedly repeals the statute as a whole.

CONCLUSION

In sum, it is possible that the constitutional amendment proposed in 2011 Assembly Joint Resolution 77, if it became effective, would be found to have repealed one or more provisions in s.

940.04, Stats., upon taking effect It does not appear likely that the proposed constitutional amendment would be found to have repealed the statute in its entirety.

Although not directly related to the analysis regarding the potential effect of the proposed constitutional amendment, a few related points are important to note. First, as mentioned, later-enacted statutes, namely ss. 940.13 and 940.15, Stats., may be held to have repealed one or more provisions of s. 940.04, Stats., by implication. In addition, under *State v. Black*, discussed above, a key provision of s. 940.04, Stats., is currently inapplicable to abortions. Because of those potentially conflicting statutes, even if the current interpretation of a woman's right to an abortion under *Roe v. Wade*, 410 U.S. 113 (1973), was overturned, it does not appear that all provisions of s. 940.04, Stats., would become enforceable as they may have been originally intended.

Finally, regardless of any judicial decision under the *Kayden* holding, s. 940.04, Stats., may be subject to challenge under the proposed constitutional amendment. In such a case, rather than arguing that the constitutional amendment repealed the statute upon taking effect, a challenger might argue that the statute violates the amended constitutional provision, as it has been interpreted by the courts. The legal analysis in such a case would likely parallel the analysis discussed above with regard to a possible inconsistency between the constitutional amendment and the statute.

If you have any questions regarding this memorandum, please feel free to contact me directly at the Legislative Council staff offices. General questions regarding 2011 Assembly Joint Resolution 77 should be directed to Don Salm (266-8540), who staffs the Assembly Committee on Homeland Security and State Affairs, to which the joint resolution has been referred.

AH:jal