FLORIDA HUMAN RIGHTS ORDINANCES

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I. INTRODUCTION

City and county governments are at the forefront of eliminating discrimination often acting in advance of the federal and state governments in identifying additional forms of invidious discrimination. Some local governments have determined that discrimination against certain classes of persons is detrimental in their communities. They want these classes to be treated equally as citizens for purposes of employment, housing, public accommodations and financial practices.

The duty of the government attorney is to opine whether there is a rational basis for any new classification and whether there is a reasonable relationship between the regulation and the discriminatory practice that is sought to be eliminated.

II. AUTHORITY.

A. Charter counties.

In the absence of a specific charter provision to the contrary, the Florida Supreme Court recognizes the power of charter counties to adopt legislation to eliminate invidious discrimination in important areas of human concern. Local governments have the power to adopt appropriate legislation to eliminate invidious discrimination in essential areas of human concern, such as housing and employment. Broward County v La Rosa, 505 So. 2d 422 (Fla. 1987)

The Florida Supreme Court expressly found that (Miami-) Dade County has the authority to enact an anti-discrimination ordinance prohibiting, among other things, age discrimination in housing. Metropolitan Dade County Fair Housing and Employment Appeals Board v Sunrise Village Mobile Home Park, Inc., 511 So. 2d 962, rehs. den., Sept 8, 1987.

The Florida Attorney General has opined that the Florida Civil Rights Act, Sections 760.01 -760.11, F.S., does not appear to pre-empt the subject matter. AGO 84-97 (Oct 22, 1984); *see also*, AGO 93-05 (Jan. 15, 1993).

See further discussion of these court decisions and opinions at V. "Court Decisions and Attorney General Opinions", infra.

B. Non-charter counties.

Chapter 125, F.S. implements the provisions of Sec. 1 (f), Article VIII of the Florida Constitution. Sec. 125.01(1), F.S., grants to the governing body of a county the full power to carry on county

government. Unless the state legislature has pre-empted the field by either general or special law, the county has full authority to exercise its home rule powers. *See*, Speer v Olson, 367 So. 2d 207 (Fla. 1978).

Also see discussion of the court decisions and attorney general opinions referenced in I. A. above at V. "Court Decisions and Attorney General Opinions, infra.

C. Police Power.

Under its police powers, city and county governments may enact ordinances that are deemed reasonably necessary for the protection of the public, health, welfare and safety (or morals) of their communities. Clarke v Morgan, 327 So. 2d 769, 774 (Fla. 1975), quoting Safer v. City of Jacksonville, 237 So. 2d 8, 12 (Fla. 1st DCA 1970). Ordinances may interfere with protected rights as long as there is a reasonable relationship between the regulation and the public necessity. Coca Cola Co., Food Div. v Department of Citrus, 406 So. 2d 1079, 1084-85 (Fla. 1981).

III. OVERVIEW OF FEDERAL AND STATE ANTI-DISCRIMINATION LAWS.

While a discussion of the applicable federal and state anti-discrimination laws is beyond the scope of this paper, it is sufficient to state that there are differences both in scope, process and available remedies. Local government ordinances, in general, can include a broader list of protected classes, and can apply to smaller entities than is covered by state and federal laws.

A. Federal laws.

Federal anti-discrimination laws provide covered persons protection from discrimination based on race, color, religion, sex (including pregnancy), national origin, disability or genetic information, and age. These laws include the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Housing Act, and the Equal Credit Opportunity Act, to name a few.

In the employment context, the Age Discrimination in Employment Act prohibits employers from discriminating against workers and applicants who are 40 years of age and older based on their age. An employer is defined to mean a person engaged in an industry affecting commerce who has 15 or more employees. The filing of a timely charge within 300 days of the alleged wrongful employment act, is a condition precedent to filing suit.

The U.S. Equal Employment Opportunity Commission ("EEOC") enforces laws against workplace discrimination. The EEOC has the authority to investigate, mediate and settle discrimination complaints on behalf of complainants. In 2011, the EEOC included "sex stereotyping" of lesbian, gay and bisexual individuals as a form of sex discrimination. In 2012, the EEOC expanded protection to transgender status and gender identity.

B. Florida Civil Rights Act.

The Florida Civil Rights Act ("FCRA"), Sections 760.01-760.11, F.S., provides covered persons protection from discrimination in employment, public accommodations, and housing on the basis of race, color, religion, sex, national origin, age, physical disability, and marital status. Since the FCRA is patterned after the federal law on the same subject, the FCRA is accorded the same construction in the state courts as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation. O'Laughlin v Pinchback, 579 So. 2d 788, 791 (Fla, 1st DCA 1991). Federal discrimination law (i.e., Title VII retaliation law) is applicable in construing the FCRA. Castillo v Roche Laboratories, Inc., 467 Fed Appx. 859 (11th Cir. 2012), citing Sierminski v Transouth Fin. Corp., 216 F. 3d at 950 (11th Cir. 2000).

The Florida Commission on Human Relations ("FCHR") enforces the FCRA by investigating and resolving discrimination complaints. Complainants must file a charge within 365 days of the alleged wrongful discriminatory act with the FCHR. The FCHR is supposed to investigate the charge within 180 days and determine whether there is reasonable cause to believe a discriminatory act or practice has occurred. The complainant may then file a civil action for damages against the employer or wrongdoer in an employment context.

IV. LOCAL GOVERNMENT HUMAN RIGHTS ORDINANCES.

A. Introduction

In the human rights context, city and county governments are often asked by its citizenry to address or regulate matters that are not covered by state or federal laws. In response, local governments have adopted ordinances prohibiting discrimination against additional classes of

persons and entities. Of recent, local governments have adopted ordinances prohibiting discrimination on the basis of sexual orientation and gender identity.

A survey conducted by the International Municipal Attorneys Association ("IMLA") several years ago showed that over 181 local governments in the United States had adopted ordinances that prohibit sexual orientation discrimination. The IMLA Model Ordinance includes sexual orientation.

B. Review of Select Human Rights/Anti-discrimination Ordinances.

1. Discriminatory classifications:

a. Majority: race, color, gender, age, religion, national origin and disability,
b. Minority: sexual orientation, gender identity or expression, familial status, and political affiliation.
(Examples: City of Gainesville, City of Key West, City of Orlando, Broward County, and Miami-Dade County.)

2. Definitions:

- City of Gainesville –

"sexual orientation" means the condition of being heterosexual, homosexual, or bisexual or having a history of such identification. This definition is not intended to permit any practice prohibited by federal or state law.

"Gender identity" means an inner sense of being a specific gender, or the expression of a gender identity by verbal statement, appearance, or mannerisms, or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth.

- City of Orlando -

"sexual orientation" means the condition of being heterosexual, homosexual or bisexual. This definition is not intended to permit any practice prohibited by federal or state law and it is not intended to require or create any special preferences in employment of contracting. Moreover, none of the subcategories within the definition of "sexual orientation" shall be deemed as a minority entitled to any rights or privileges as set forth in Article II or III of this Chapter regarding MBE/WBE.

"Familial status" - A discriminatory act is committed because of familial status if the act is committed because the person is: (1) pregnant; (2) domiciled with an individual younger than 18 years of age in regard to whom the person (i) is the parent or legal custodian or (ii) has the written permission of the parent or legal custodian for domicile with that person; (3) in the process of obtaining legal custody of an individual younger than 18 years of age; or (4) is an individual younger than 18 years of age who is domiciled with a person described in (2) (i) or (ii) above.

- Broward County –

  "Familial status" means one or more individuals who have not attained the age of 18 years and who are domiciled with: (i) a parent or another person who has legal custody of such individual or individuals; or (ii) the designee of such parent, or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is the process of securing legal custody of any individual who has not attained the age of 18 years.

  "Gender identity or expression" means gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth

  "Sexual orientation" means being heterosexual, bisexual, or homosexual, or the perception that an individual is associated with individuals who are heterosexual, bisexual, or homosexual.

3. Discrimination in employment:

   - City of Gainesville –

     "Employer" means any person who has 5 or more employees for each working day in each of 4 or more calendar weeks in the current or preceding year, and any agent of such a person.

   - City of Orlando –

"Employer means any person who has more than 5 full-time employees working more than 30 hours per week, or who has more than 10 employees irrespective of the number of hours per week, in each of 13 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

- Broward County -

  "Employer" means a person, or any agent of such person, who employs 5 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. The weeks need not be consecutive. The term does not include the United States, or a corporation wholly owned by the U.S. Government, an Indian tribe, the State of Florida, or any of its agencies, and Broward County and its agencies, excluding independent authorities, independent boards and constitutional county officers.

4. Exemptions:

   - City of Gainesville –

     The Ordinance does not apply to the federal, state or local government or agency. The City's Human Rights Board does not have jurisdiction over the City of Gainesville, as a municipal corporation, or any other governmental entity. The City's Equal Opportunity Director investigates internal complaints of discrimination under administrative policy of the City.

     The Ordinance also does not apply to religious institutions with respect to the employment of persons of a particular religion, and does not apply to religious institutions in the areas of sexual orientation and gender identity.

   - City of Orlando –

     The Ordinance does not apply to religious organizations, or charitable organizations which are operated or controlled by a religious organization, and does not prohibit such organizations from limiting, or granting preferences in employment or sales or housing accommodations when promoting religious principles for which they are established or controlled, as permitted by state and federal laws.

The Ordinance in the area of housing does not prohibit a private club that is not open to the public from limiting the rental or occupancy of lodging to its members or granting preferences to its members.

- Broward County –

  In the area of employment discrimination, the Ordinance does not apply to the federal or the state governments or its agencies, Indian tribes, and Broward County and its agencies and constitutional officers, and to religious corporations or associations when employing persons of a particular religion.

  In the areas of sexual orientation or gender identity or expression, the Ordinance does not apply to any religious school, religious institution, or association.

5. Enforcement:

   - City of Gainesville –

     Investigations are conducted and voluntary conciliation agreements are made by the City's Equal Opportunity Office. Quasi-judicial (contested) hearings are conducted by the Human Rights Board with the assistance of a hearing officer in some instances.

     Penalty: municipal ordinance violation. Orders of the Board and conciliation agreements are also enforceable through the civil courts. Complainants may also seek enforcement through the civil courts upon a determination of reasonable cause by the Board.

   - City of Orlando -

     Investigations are conducted and voluntary conciliation agreements are made by the City's Human Relations Official. Quasi-judicial (contested) hearings and recommended orders are made by the Review Board.

     Penalty: If a discriminatory housing practice is found, the Human Relations Official may order the appropriate relief, including actual damages, reasonable attorney's fees, costs and other equitable relief. In accord with the federal Fair Housing

Act of 1988, the Ordinance empowers the Human Relations Official to assess a civil penalty not to exceed $10,000 for a first time offender, $25,000 for a second time offender and up to $50,000 for two or more offenses in a seven year period.

A complainant may also bring a civil action in the area of housing, and the city attorney can be directed to commence a civil action when the matter raises an issue of "general public importance".

- Broward County -

  Investigations are conducted and voluntary conciliation agreements are made by the County's Office of Intergovernmental Affairs and Professional Standards. Quasi-judicial (contested) hearings and recommended orders are made by a hearing panel of the Human Rights Board.

  Penalty: In the area of housing, administrative penalties may be assessed up to $11,000 for a first time offender, up to $27,500 if more than one offense in a five year period, and up to $55,000 if two or more violations in a seven year period. The Human Rights Board may also assess actual damages, reasonable attorneys fees and costs and other equitable relief. The County Attorney may be authorized to file a complaint on behalf of a complainant in a civil court action. A complainant may also file a civil action.

6. City of Gainesville Recent Experience:

   On information received from the City's Equal Opportunity Director, Cecil E. Howard, the Equal Opportunity Office processes approximately thirty discrimination cases each year. Of these thirty cases, approximately two-thirds involve matters arising out of alleged violations of the ordinance in the private sector, and one-third arise out of alleged violation of city policy. Complaints of race discrimination comprise the largest number of charges with retaliation and sex discrimination filling out the balance.

   Of the approximate thirty cases filed each year, approximately 85% result in a "no cause" determination. Approximately 10% of the total annual cases result in a conciliation agreement through mediation, 3% result in a "for cause" determination, and 2% are dismissed for a variety of reasons.

According to the City's ordinance, complaints must be filed within 180 days of the alleged discriminatory act. Complaints filed after the jurisdictional date are referred to either the Florida Commission on Human Relations or the Equal Employment Opportunity Commission, both of which have longer filing dates. There is no work sharing agreement between the City and the state or federal agencies.

V. COURT DECISIONS AND ATTORNEY GENERAL OPINIONS.

A. Broward County v La Rosa, 505 So 2d 422 (Fla. 1987):

Facts: Broward County adopts its Human Rights Ordinance that empowers the Human Rights Board to: 1) determine whether a discriminatory practice or act has occurred; and 2) if found, to order the payment of actual damages including compensation for humiliation and embarrassment. After an investigation, the Board determined that a discriminatory practice had occurred and ordered Mr. La Rosa to pay $4000 representing compensation for humiliation and embarrassment.

The trial court entered summary judgment in favor of the plaintiff, Mr. La Rosa, declaring the county ordinance invalid as unconstitutional.

The appellate court affirmed ruling that the ordinance violated certain provisions of the Florida Constitution.

The Florida Supreme Court:

- Accepted the stipulation of both parties that local governments have the power to adopt appropriate legislation to eliminate invidious discrimination in essential areas of human concern such as housing and employment.
  (Court cites with favor AGO 084-97 opining that local governments have the power to enact anti-discrimination ordinances.)
- In dicta, the Court commends Broward County for its moral commitment to eliminate invidious discrimination.
- Holding: County ordinance that empowers a local administrative agency to award actual damages, including compensation for humiliation and embarrassment, violates article 1, Sec. 22 (trial by jury) and article II, Sec. 3 (separation of powers) of the Florida Constitution.
- In ft. 5, the Court finds a significant difference between administrative awards of quantifiable damages, such as back

rent or back wages, and awards for non-quantifiable damages, such as pain and suffering or humiliation and embarrassment.

B. Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc, 511 So. 2d 962 (Fla. 1987).

Facts: Dade County adopts a wide-ranging anti-discrimination ordinance empowering its Board to determine whether a discriminatory act or practice has occurred. The Executive Director recommends the Board assess common law damages for humiliation, embarrassment and mental distress against the offender. The offender files suit.

Florida Supreme Court:

- Relies on its holding in La Rosa, and reiterates the power of local governments to adopt anti-discrimination ordinances, specifically in the areas of age discrimination in housing.

- Holding: The provisions of the ordinance that authorizes the award of common law damages for non-quantifiable injuries is unconstitutional under the same provisions of the Florida Constitution cited in La Rosa.

C. Laborer's International Union of North America, Local, 478 v Burroughs, 541 So 2d 1160 (Fla. 1989).

Facts: In the employment context, Dade County's anti-discrimination ordinance applies to an employer with 5 or more employees. The Ordinance empowers its Board to assess quantifiable damages, such as back pay. The Board assessed back wages in the sum of $30,686.20, plus interest, front-pay, i.e., future lost wages, in the sum of $8,883, and attorneys fees and costs in the amount of $19,178.96.

The trial court affirmed the decision of the Board.

The appellate court on a petition for writ of certiorari sustained the trial court decision.

The Florida Supreme Court:

- Holding: The Ordinance is not pre-empted by the Florida Civil Rights Act and the County Board has the authority to award back pay. The Court found the ordinance did not authorize the Board to award front pay and attorneys fees. Accordingly, the Court declined to reach whether the Board could constitutionally award

front pay, but held that Board had no authority under the ordinance to award attorneys fees. However, the Court recognized the power to assess actual damages, stating: "(b)y implication (in Metropolitan Dade County Fair Housing and Employment Appeals Board, *supra*) we have already indicated that an administrative agency may be authorized to award quantifiable damages, and we now so hold."

- The Court finds that "it is beyond doubt that attorneys fees are sufficiently quantifiable to be awarded by an administrative agency." Id at 1164.

- In a dissenting opinion, Justice Overton expresses concern that under the majority opinion the 393 municipalities and 11 chartered counties and 56 nonchartered counties are authorized to create administrative boards that can award damages and direct issuance of mandatory injunctions on multiple subjects that, in his view, is contrary to article V of the Constitution.

D. AGO 093-05

Opines: 1) Charter counties have the power to adopt anti-discrimination ordinances; 2) county ordinance may authorize local administrative agencies to assess certain quantitative damages, such as back pay and attorneys fees. *See* City of Venice v Valente, 429 So 2d 1241 (2d DCA 1983) upholding a municipal ordinance allowing the city to recover attorneys fees and court costs when abating a nuisance; and 3) the Local 478 decision relating to the assessment of damages is not limited to Dade County.

VI. PROPOSED STATE LEGISLATION (BILLS).

In the 2013 state legislative session, SB 710 (Companion HB 0653) proposed to include sexual orientation and general identity or expression as impermissible grounds for discrimination under the Florida Civil Rights Act. The senate bill died in the commerce and tourism committee.

For informational purposes, definitions proposed in SB 710:

"Gender identity or expression" means gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth.

"Sexual orientation" means an individual's actual or perceived heterosexuality, homosexuality, or bisexuality.

VII. CONCLUSION.

Under home rule authority, city and county governments in Florida are the laboratories that are able to address ever-changing societal needs. In the human rights context, city and county governments have adopted human rights ordinances that offer protection from discrimination to a wider class of persons than provided by either federal or state law.

Under case law, cities and counties in Florida clearly have the authority to enact ordinances to address invidious discrimination under its police powers. Local governments have the authority to address discrimination in areas not covered by federal or state law as long as there is a rational basis. Remedies for determinations of discrimination include fines, as provided by law, and quantifiable damages including attorneys fees.

DOMESTIC PARTNERSHIP REGISTRATIONS

BY CITY AND COUNTY GOVERNMENTS

IN FLORIDA

By

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I. INTRODUCTION

In response to ever-changing societal needs and requests, some city and county governments in Florida have created domestic partnership registrations. The registration is an administrative system enacted by ordinance that provides recognition to the domestic partnership of two persons.

This paper will review the legal relationships currently recognized in the State of Florida. The basic framework of a domestic partnership registration ordinance will be examined together with a discussion of relevant court decisions. Finally, the paper will address some commonly asked questions and identify the legal issues that should be considered when creating such a domestic partnership registration system through the adoption of an ordinance.

II. STATE REGULATED RELATIONSHIPS

A. Marriage

Marriage is a legal relationship between two persons of the opposite gender that is regulated by state law. In order for a marriage to be recognized in Florida, a license must be issued by a county court judge or the clerk of the court. The license requires a series of fees. Sections 28.24(23), 741.01, and 741.02, F.S.

1. State Licensure Requirements.
   Parties must:
   (a) Submit a written affidavit signed by both parties;
   (b) Provide social security numbers, or other identification indicating the ages of the parties;
   (c) Provide a statement indicating completion of a premarital preparation course and reading of the Family Law Handbook
   (d) Disclose whether the parties have children together.

   Requirements of parties:
   (a) With limited exceptions, parties must be at least 18 years of age. Sec. 741.04, F.S.;
   (b) One party must be a male and the other female. Sec 741.04, F.S.
   (c) Solemnize the marriage either by civil or religious ceremony. Sec. 741.08, F.S.

2. Prohibition against same gender marriage.

(a) Florida statute.

In 1997, the Florida Legislature adopted a law that prohibits marriage between two persons of the same gender. Sec. 741.212, F.S. The statute was ostensibly implementing the authority granted states under the federal Defense of Marriage Act (DOMA). The legislature defined the term "marriage" to mean a union between one man and one woman.*

A challenge to the constitutionality the state statute and the federal DOMA was unsuccessful in the federal court. The plaintiffs unsuccessfully argued that the laws were unconstitutional on the grounds that both laws violated the Full Faith and Credit and other Clauses of the U.S. Constitution. The court declined to elevate the ability to marry a person of the same gender as a fundamental right guaranteed by the Due Process Clause. Wilson v. Ake, 354 F. Supp. 2d 1298, 1302 (M.D. Fla. 2005)

A challenge to a portion of the federal DOMA law that denies to legally married same gender persons certain benefits that are available to legally married persons is currently pending before the U.S. Supreme Court. A decision is expected in the summer of 2013.**

- Congress adopted DOMA in response to a Hawaii court decision that upheld the validity of a marriage between two persons of the same gender. DOMA allowed states to not afford full faith and credit to same gender marriages that were legally entered in another state. House Committee on Governmental Operations, Staff Analysis of CS/HB 147 – *Same Sex Marriage* (March 6, 1997).

** Windsor v. U.S. 699 F.3d 169 (2d Cir. 2012), cert granted, 133 S.Ct. 786 (Dec. 7, 2012).

(b) Florida Constitution

In November 2007, the Florida electorate approved an amendment to the Constitution, commonly known as the Florida Marriage Protection Act. The Amendment defines marriage and prohibits

any other legal union "that is treated as marriage" or "the substantial equivalent" of marriage:

"Article 1. Declaration of Rights.

Sec. 27. Marriage defined.-

Inasmuch as marriage is the legal union of one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."

There are no published court opinions interpreting the provisions of the above-referenced constitutional provision. In an Advisory Opinion to the Florida Attorney General, the Supreme Court of Florida rejected a claim that the Amendment violated the single subject requirement of the Florida Constitution and the statutory requirement for ballot summary. Advisory Opinion to the Attorney General Re Florida Marriage Protection Amendment, 926 So 2d 1229 (Fla. 2006). The opponents argued that the Amendment combined two separate issues: marriage and legal unions that provide the benefits and responsibilities of marriage. The Court said:

"The proposed amendment does not impermissibly force voters to approve a portion of the proposal which they oppose to obtain a change which they support. Rather, the voter is merely being asked to vote on the singular subject of whether the concept of marriage and the rights and obligations traditionally embodied therein should be limited to the union of one man and one woman. The plain language of the proposed amendment is clear that the legal union of a same-sex couple that is not the "substantial equivalent" of marriage is not within the ambit of the constitutional provision." Id. at 1234.

The last sentence of the Opinion may give an indication how a Florida court may interpret the Amendment. Some analysts maintain that only those non-traditional unions, like domestic partnerships, that exceed a yet undefined threshold on the continuum of rights conferred on those in marriage would violate the Florida Constitution.

A recent appellate court decision from Wisconsin could provide guidance to a Florida court if this issue is properly raised before a court. In Appling v Doyle, 345 Wis. 2d 762 (2012), the appellate court interpreted an amendment to the Wisconsin Constitution that recognizes marriage as between

one man and one woman, and prohibits a "legal status identical or substantially similar to that of marriage for unmarried individuals". The appellate court held that the legal status of a domestic partnership was not substantially similar to the legal status of marriage. In reaching its decision the court compared the requirements for eligibility, formation, rights and obligations, and termination that apply to marriage and domestic partnerships.

3. States legalizing same gender marriage.

As of the publication of this paper, twelve states and the District of Columbia have adopted laws permitting same gender marriage. These states are Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, Delaware, Minnesota and Rhode Island. One of the recently adopted laws from the State of Delaware recognizes same gender marriages from other jurisdictions, affords the same rights, obligations and benefits of opposite gender marriages, and does not interfere with the religious practices and beliefs of any religion. HB 75, signed into law May 7, 2013, State of Delaware.

B. Common Law Marriage in Florida.

A common law marriage in Florida can be a legally effective marriage that occurs: 1) without a license; 2) when a man and a woman live together as husband and wife; 3) when they intend to be married; and 4) when they hold themselves out to others as a married couple. *See* In re Bragg's Estate, 334 So 2d 271 (Fla. 3d DCA 1976).

In 1968, Florida abrogated common law marriages entered into after 1968. Florida courts continue to recognize common law marriages when validly entered in Florida pre-1968, or in another state. American Airlines, Inc. v Mejia, 766 So 2d 305 (Fla. 4th DCA 2000). When recognized in Florida, common law marriages are given the same recognition as state licensed marriages. Budd v. J.Y. Gooch Co., 27 So 2d 72 (1946).

III. DOMESTIC PARTNERSHIP REGISTRATION BY CITY AND COUNTY GOVERNMENTS.

A. Overview of Local Government Domestic Partnership Registration Ordinances.

1) Jurisdictions.
As of the writing of this paper, nineteen city and county governments in Florida have enacted domestic partnership registration ordinances. These are:
Counties: Orange, Volusia, Pinellas, Palm Beach, Broward and Miami-Dade

Cities: Coral Gables, Clearwater, Gainesville, Gulfport, Key West, Miami Beach, North Miami, Orlando, Sarasota, St. Petersburg, Tampa, Tavares and Venice.

All ordinances are available for viewing at www.municode.com.

2) Process:
The ordinances generally provide an administrative process for the formal recognition of domestic partnerships between two persons of the same or different genders. The ordinances differ to the extent of the rights and responsibilities conferred.

3) General Provisions:
A domestic partnership consists of two persons who meet certain minimum requirements relating to age, marital or partnership status, blood relationship, and willingness to be jointly responsible for each other's food, shelter and well-being. In order for a domestic partnership to be recognized by the particular local government, a document, usually an affidavit, must be filed with the city or county clerk's office who maintains the registry. There are usually no residency requirements for registration. Some local governments offer certificates to show registry status. A process also exists for terminating the partnership that usually requires either one of the persons in the partnership to file a termination document with the city or county clerk's office

4) Rights and Benefits:

The ordinances vary as to the rights and benefits conferred. A majority provides for emergency notifications, visitation rights at health care and correctional facilities, the right of one to make decisions for the other partner for health care and burial, and pre-need guardianships. The ordinances provide that any rights conferred under the ordinances exist to the extent that they do not conflict with federal or state law. A minority addresses the local government's employee benefits, and some grant a preference in obtaining contractual work for the government. (*See further discussion in IV. "Legal Issues", infra.)* Some ordinances recognize domestic partnership registrations from other jurisdictions both within and outside of the State of Florida. (*See IV. "Legal Issues", infra.)* .

5) Enforcement and penalties:

Enforcement rights under the ordinances vary. Some ordinances create a private legal right to bring a civil action to enforce the rights and benefits conferred under the ordinance. A minority of the ordinances allows enforcement through the imposition of fines or other governmental action.

A comparison of some of these ordinances that was prepared by the Office of the County Attorney for Sarasota County is attached as Attachment "A".

B. Basic Framework of a Domestic Partnership Registration Ordinance.

1. Registration.

- Domestic partners must sign an affidavit, file the appropriate form(s) and pay a fee.
- Affidavit states that each person:
  (a) Is at least 18 years of age and competent to contract
  (b) Is not married or is not a domestic partner with a different domestic partner co-applicant
  (c) Is not related by blood to the other domestic partner co-applicant as defined (by law or a certain lineage)
  (d) Considers himself or herself to be a member of the immediate family of the other co-applicant,

and agrees to be jointly responsible for basic needs, such as food and shelter.

2. Termination of the Domestic Partnership.

(a) Filing.

Either domestic partner may terminate the domestic partnership by the filing of a sworn termination statement with the city or county clerk's office. If the statement is not signed by both partners, then notice must be provided to the non-signing domestic partner.

(b) Automatic termination.

In the event one or both domestic partners marry, die, or register with another domestic partner, the domestic partnership automatically terminates.

3. Rights and legal effect.

To the extent not superseded by federal or state law or other local law/ordinance, or other legal instrument, the following rights are granted under the ordinance:

(1) Health care visitation
(2) Correctional facility visitation
(3) Funeral burial decisions
(4) Notifications to the other domestic partner in the event of an emergency
(5) Pre-need guardianship pursuant to Ch. 744, F.S.
(6) Participation of one domestic partner in the education of a dependent of the other domestic partner
(7) Health care decisions to act as surrogate, as provided in Ch. 765, F.S., or other applicable federal law.

4. Reciprocity and enforcement.

Some city and county governments recognize a domestic partnership validly existing in another jurisdiction. Some ordinances are silent on this issue.

Some city and county governments provide for private causes of action by an affected party to enforce the ordinance.

Some ordinances provide for the levy of fines as a municipal or county ordinance violation.

IV. COURT DECISIONS.

A. Domestic Partnership Ordinance,

The leading case in Florida that examined a county's domestic partnership registration ordinance, but that pre-dates the Florida Protection Act Amendment adopted by the electorate in 2007, is Lowe v Broward County, 766 So. 2d 1199 (Fla. 4th DCA 2000).

Facts: Mr. Lowe, a Broward County resident, sued the County for declaratory and injunctive relief alleging that the County's Domestic Partnership Act violated the preemption clause of the Florida Constitution, specifically as it relates to the provisions of Sec. 741.2121, F.S., and the allowance of limited employment benefits to domestic partners of Broward County employees. The County ordinance also provides rights to registered domestic partners relating to visitation at correctional and health care facilities.

Trial court: The trial court entered summary judgment in favor of the County.

Appellate court: The appellate court rejected Mr. Lowe's argument that the ordinance regulated the area of "marriage" or "relationships" that was already regulated and reserved to the state by Sec. 741.212, F.S. The court found that the domestic partnership ordinance did not treat domestic partnerships the same as "marriage", but created a contractual right. Since the ordinance did not treat non-traditional domestic relationships the same or of equivalent status with "marriage" under the continuum of rights and obligations conferred by state law to "marriage", and did not interfere or curtail rights under "marriage", there was no conflict with state law. As the court said,

"The (ordinance) does not curtail any existing rights incident to a legal marriage, nor does it alter the shape of the marital relationship recognized by Florida law…(T)he Act does not address the panoply of statutory rights and obligations exclusive to the traditional marriage relationship…The Act does not create a legal relationship that, because of the interest of the state, gives rise to rights and obligations that survive the termination of the relationship. Unlike a traditional marriage, a domestic

partnership is purely contractual, based on the mutual agreement of the parties. (e.s.) *Id*. at 1205-06.

The court found that Sec. 741.212, F.S., is directed at same gender marriages, and that the provision of limited employment benefits to domestic partners of County employees does not create a "marriage-like relationship", nor is it limited to persons of the same gender.

The court invalidated one section of the ordinance relating to health care decisions finding that the ordinance conflicted with Sec. 765.401, F.S. The court applied the ordinance's severability clause to uphold the remainder of the ordinance.

As noted above, this case preceded the 2008 effective date of the voter approved Florida Marriage Protection Act. The reasoning in Lowe together with the Advisory Opinion provided to the Attorney General by the Florida Supreme Court discussed earlier in this paper, lead some analysts to conclude that domestic partnership ordinances are not likely to be invalidated under the Florida Marriage Protection Act Amendment.

B. Domestic Partnership Agreements.

While beyond the scope of this paper, local government attorneys should consider the courts' treatment of domestic partnership agreements in the civil context. For example, in Posik v Layton, 695 So. 2d, 759 (Fla. 5th DCA 1997), the court found that an agreement for support between two unmarried persons is valid unless it is inseparably based upon illicit consideration of sexual favors. The court, in dicta,said that the parties were exercising their constitutional private property and contract rights.

However, in Wakeman v. Dixon, 921 So. 2d 669 (Fla. 1st DCA 2006), the court considered private legal agreements between two same gender persons relating to the conception and parental responsibilities relating to a child. The court found that Chapter 61, F.S., regulated the area of custody and visitation rights of children. Accordingly, the private agreements between two partners are "unenforceable to the extent that they purport to grant parental rights…". *Id* at 673.

Additionally, in Bashaway v. Cheney Bros., Inc., 987 So. 2d 93 (Fla. 1st DCA 2008), the court held that a same gender

partner had to right to maintain a loss of consortium claim. This type of claim, the court said, is dependent upon a recognized legal relationship under Florida statutory law. In a footnote, the court noted that its decision had to do with the rights and liabilities of third parties. The court further noted that Florida has long recognized agreements between unmarried, cohabitating persons that will be enforced by the courts. *See, e.g*. Posik v. Layton, *supra*; Crossen v Feldman, 673 So. 2d 903 (Fla. 2d DCA 1996; Stevens v. Muse, 562 So. 2d 852 (Fla. 4th DCA 1990).

V. LEGAL ISSUES.

1. Does a city or county possess the power to enact a domestic partnership registry ordinance?

   Opinion: Yes, based upon the analysis in Lowe v Broward County, *supra,* until legislatively or judicially declared otherwise.

2. Does a domestic partnership registry ordinance violate article 1, sec 27 of the Florida Constitution, commonly known as the Florida Marriage Protection Act?

   Opinion: Probably not based upon the Opinion and analysis of the Florida Supreme Court in Advisory Opinion to the Attorney General Re: Florida Marriage Protection Amendment, *supra.* There is no other reported judicial decision in Florida.

   For additional guidance, the analysis of the Wisconsin Supreme Court in Appling v Doyle, *supra*, is instructive. An opposite conclusion was reached, however, in National Pride at Work, Inc. v Governor of Michigan, 481 Mich. 56 (2008). The Supreme Court of Michigan held that the particular marriage amendment prohibited public employers from providing health insurance benefits to qualified same gender domestic partners of their employees. The language of the marriage amendment is worded somewhat differently from either Wisconsin's or Florida's comparable constitutional provision.

3. Does a city or county possess the power to grant reciprocity to other domestic partnerships validly entered in another jurisdiction either within or outside of the State of Florida?

Opinion: This is somewhat an issue of first impression. For cities, an analysis of the extraterritorial powers clause of Sec. 166.021 (3)(a) is necessary. For cities and counties, the existence of interlocal agreements with other jurisdictions would be beneficial and could address many issues. *See* Sections 125.01 (1)(p) and 163.01, F.S. For guidance, *see also* Devlin v City of Philadelphia, 862 A 2d 1234 (2004), wherein the Pennsylvania Supreme Court struck down the City of Philadelphia's attempt to provide rights to "life partners" who had no connection to the City. The Court found that such a provision constituted an ultra vires act because it exceeded home rule authority.

4. Does the federal Employee Retirement Income Security Act (ERISA) prohibit city and county governments from providing preferences to contractors who provide domestic partner health benefits to their employees when they do business with the city or county?

   Opinion: A majority of ordinances enacted in Florida do not provide preferences to contractors who do business with the city or county. Litigation on this issue is active nationally. ERISA prohibits state and local governments from regulating employee benefit plans. In particular, ERISA's preemption clause provides that "it shall supersede any and all state laws insofar as they now or hereafter relate to any employee benefit plan." 29 USC 1144(a).

   One Florida federal court addressed this issue in E.I.C. Elkins Contractors, Inc. v Chiles, 872 F. Supp. 931 (N.D. Fla. 1994). In this case the court invalidated a state statute that required every contractor and each subcontractor ensure that each employee have access to hospitalization and medical insurance benefits on state contracts in excess of $100,000.

5. Is it advisable to include in a domestic partnership registration ordinance disclaimer language to protect the city or county from liability?

   Opinion: City and county domestic partnership registry ordinances confer certain rights to and obligations on domestic partners. The City of Sarasota website, for example, features a list of frequently asked questions that identifies these issues. Government attorneys should consider whether the ordinance and the administrative forms utilized in the filing and termination process should include disclaimer language. Such a provision could inform applicants and domestic partners of the rights and obligations conferred under the ordinance, and the possible need

to consult with private legal counsel for domestic and estate planning purposes.

6. What are the implications for city or county governments granting marriage spousal equivalent benefits to domestic partners of government employees?

   Opinion: City and county governments are generally authorized to provide marriage "spousal equivalent" benefits to domestic partners of government employees. First, there will likely be an increased cost to the government that should be considered by the political and administrative leadership. Secondly, there are federal tax law issues for the employees that are beyond the scope of this paper, such as whether the domestic partner is considered a dependent under the I.R.S. Code. The same issue applies to the children of domestic partners. Legal counsel knowledgeable in these areas may need to be consulted. Finally, the provision of spousal equivalent benefits to domestic partners may need to be examined depending upon the decision of the U.S. Supreme Court in Windsor v. U.S., *supra.*

VI. PROPOSED STATE LEGISLATION.

In the 2013 legislative session, SB 196 entitled "Families First" was filed in the state senate. The bill created a statewide system for the registration of domestic partnerships. The bill would grant certain rights to domestic partners and their children similar to the list of rights granted to spouses in marriage.

The Committee Substitute (CS) to SB 196 reduced the scope of rights from those conferred by marriage to six specific rights. With one exception relating to ownership of real property, the rights mirror the rights conferred in a majority of the city and county ordinances. They are: 1) the same visitation right in a health care facility as is given to spouses; 2) the same visitation privilege in a correctional facility as is given to spouses; 3) emergency notification if such notice is provided to spouses or relatives; 4) the right to jointly own property by tenancy by the entirety; 5) the same authority to act as health care proxy when a proxy has not otherwise been designated as is available to a spouse; and 6) the same authority a spouse has to act as patient representative for the disposition of a partner's remains.

A violation of the bill is enforceable by a private cause of action. The prevailing party would be entitled to attorneys fees.

The bill would not preempt a city or county government from enacting a domestic partnership ordinance as long as it does not conflict with the bill.

CS/SB 196 was approved by the Senate Committee on Children, Families and Elder Affairs by a vote of 5 to 4. The bill died in the Judiciary Committee.

VII. CONCLUSION

The realization of home rule authority and power for city and county governments is made evident in a local ordinance, such as the domestic partnership registry ordinance. As with all laws of first impression that directly affect personal rights, there are legal issues that present challenges for the local government attorney.

In the area of domestic relations, emotional and political factors often play a role in the discussion of the issues. The challenge for the local government attorney is to present the legal issues, raise the relevant legal authority, and offer professional legal advice and counsel in the best interest of the political subdivision. This is particularly challenging in the typical arena of a televised public meeting.

Local government is "where the action is" in our ever-changing society. The local government attorney is often in the middle of that action.

Domestic Partnership Registry Ordinances

	Emergency Notification/Healthcare Visitation Partner	Healthcare Decisions (Ch. 765, F.S.) – Healthcare Surrogate	Funeral/Burial (Ch. 497, F.S.)	Corrections Facility/Visitation (Children)	Pre-Need Guardian (Ch. 744, F.S.)	Education	Enforcement Fines or other governmental action	County Benefits in Ordinance	Procurement Benefits
City of Sarasota 2012	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
City of Venice 2013	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Broward County 1999	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes
Orange County 2012	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Miami-Dade County 2008	Yes	No	No	Yes	No	No	No	Yes	No
Palm Beach County 2006	Yes	Yes	Yes	Yes	Yes	No	No	No	No
City of Gainesville 2007	Yes	No	Yes	Yes	Yes	Yes	No	No	No
City of St. Petersburg 2012	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No

PREPARED BY SARASOTA COUNTY ATTORNEY'S OFFICE

ATTACHMENT "A"