

Report on Implications of Florida's Proposed Marriage Ban

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The Proposed Florida Constitutional Ban on Same-Sex Marriage Is Really a Ban on Health Benefits for Domestic Partners and their Children

On February 14, 2005, a coalition of organizations calling themselves the “Florida Coalition to Protect Marriage,” including the Florida Baptist Convention, the Christian Coalition and the Liberty Counsel announced the launching of a petition campaign to place on the ballot a proposed constitutional amendment to the Florida constitution that would ban marriage for same-sex couples and other forms of legal recognition of same-sex relationships.

The Proposed Amendment to Florida’s Constitution:

The text of the proposed amendment reads: “Inasmuch as marriage is the legal union of only 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.”

The Motivation behind the Proposed Amendment:

Proponents of the proposed constitutional amendment claim that its purpose is to defend and preserve the institution of marriage. However, notwithstanding their claims to the contrary, it is transparent from both their record and statements that the drive to amend the Florida Constitution will go much further than addressing the issue of marriage.

The proposed amendment has little to do with preserving the institution of marriage – especially in light of the Florida’s “Defense of Marriage Act,” which prohibits recognition in Florida of a marriage between two people of the same sex, even if the marriage was performed in another state. Because Florida Law contains this prohibition on the recognition of marriages between same-sex couples, Gov. Jeb Bush opposes the petition drive and the effort to change the Constitution, saying that “I believe the Constitution shouldn’t be changed unless it is necessary.” (Associated Press, February 14, 2005)

The roll-back of certain rights and privileges beyond that of marriage has been the goal of these conservatives. For example, the Liberty Counsel has supported state statutes that criminalize sexual relations between persons of the same gender [*see Lawrence v. Texas*, 539 U.S. 558 (2003), amicus briefs filed in defense of upholding the state sodomy statute]; has fought health and other employee benefits for the same sex partners and children of public employees [*see infra, Martin v. City of Gainesville* (Fla. 11th Cir. Ct. 2000) (No. 01-00-CA-1814), contesting the grant of domestic partner benefits to Gainesville City employees]; supported Florida’s unique law prohibiting otherwise qualified gay people from adopting [*see Lofton v. Sec’y of the Dept. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), amicus briefs filed in defense of a law banning gay adoption]; and has opposed passage of human rights ordinances (e.g., in Miami-Dade County, prohibiting discrimination based on sexual orientation.)

Florida Currently Bans Same-Sex Marriage by Statute:

As Governor Bush has noted himself, the proposed amendment is completely unnecessary to preserve “traditional” marriage in Florida. In 1997, the Florida legislature enacted Florida Statute § 741.212, banning marriages between persons of the same sex. The statute provides:

(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.

(3) For purposes of interpreting any state statute or rule, the term “marriage” means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

FLA. STAT. ANN. § 741.212 (2004).

A Threat to Domestic Partner Benefits and Other Important Rights:

On its face, the proposed constitutional amendment appears to be directed at prohibiting same-sex marriages. However, the effect of the language of the amendment is much more sweeping. In reality, the practical consequences of the proposed constitutional amendment could move considerably beyond banning same-sex marriage. Rather, the amendment could provide a legal basis to challenge domestic partner benefits—affecting not only gays and lesbians, but also unmarried heterosexual couples and children.

Domestic partner benefits are employee benefits that are provided by employers to qualifying families. Such benefits may include medical and dental insurance, as well as life, long-term disability and accidental death and dismemberment insurance, and survivor benefits. Often these benefits provide the only source of health coverage for those not living in traditional mixed-gender marriages.

The effect of this amendment could extend beyond employee benefits to cover such basic issues as whether a person could take leave to care for a sick partner or even to attend a loved one’s funeral. It could affect other important rights that many of us take for granted, including the right to visit a loved one in the hospital, make medical decisions if a partner is incapacitated, or make burial arrangements if a partner passes away.

Inconsistent Positions of Conservative Advocates:

When questioned about the detrimental effect the amendment would have on domestic partner benefits, attorney Mary McAllister of the conservative Liberty Counsel replied that governments could grant benefits to domestic partners as long as they do not define the relationship as “a substitute for marriage.” See George Bennett, *Group Launches Drive for Florida Amendment Banning Same-Sex Marriage*, PALM BEACH POST, February 15, 2005. This statement directly contravenes the position Liberty Counsel has taken in previous legal challenges.

Although Liberty Counsel now claims that governmental units (including counties, municipalities, and public universities) would still be able to provide domestic partner benefits if the proposed constitutional amendment passes, in 2000 the organization stated the opposite position.

In a legal memorandum filed in the Alachua County circuit court, Liberty Counsel argued that granting domestic partner benefits was illegal. See Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment at 8, 13-14, *Martin v. City of Gainesville*, (Fla. 11th Cir. Ct. 2000) (No. 01-00-CA-1814).

In that case, the plaintiff, Jack Martin, objected to his tax dollars being spent to provide benefits for the domestic partners of Gainesville city employees. On behalf of plaintiff, Liberty Counsel challenged the grant of benefits to *all* unmarried couples—“pre-marital and extra-marital, homosexual and heterosexual[.]” See Plaintiff’s Memorandum at 1-2, *Martin* (No. 01-00-CA-1814).

On behalf of Mr. Martin, Liberty Counsel argued that the domestic partner relationship recognized for employee benefits created a relationship that was the equivalent of marriage, and that it was precisely this equivalency that allegedly made the domestic partner relationship void. See Plaintiff’s Memorandum at 5, 15, *Martin* (No. 01-00-CA-1814). The health insurance policy under attack in that case required couples to have a demonstrable commitment to each other. Specifically, the policy required the domestic partner employee to meet certain criteria, such as: (1) the partners were each other’s sole domestic partner; (2) they had a common residence; (3) they shared responsibility for a significant measure of each other’s common welfare and financial responsibilities; as well as (4) the existence of a joint lease, mortgage or deed, or joint ownership of an automobile or a regularly used checking or savings account. *Id.* at 4.

Combining Ms. McAllister’s recent statements in the Palm Beach Post with Liberty Counsel’s “equivalency” argument, it is these requirements/criteria that define the relationship as “a substitute for marriage” and make the domestic partner relationship void. In other words, it appears at first glance that Liberty Counsel would condone the grant of benefits as long as the relationship, or the definition thereof, does not mirror that of marriage.

However, reading further into Plaintiff’s Memorandum it becomes apparent that religious conservatives oppose granting benefits to domestic partners, however the relationship is defined.

Liberty Counsel argued that by providing benefits to domestic partners of employees, the government would be treating those partnerships like marriages. *See* Plaintiff's Memorandum at 14, *Martin* (No. 01-00-CA-1814). Further, Liberty Counsel reminded the court that any relationships treated like marriages were, in its understanding of the law, forbidden. *Id.* Thus, the logical conclusion of Liberty Counsel's argument is that the government could not grant benefits to domestic partners, regardless of how that relationship was defined, because it was the grant of the benefits itself that was illegal. The end result of this argument, should the proposed constitutional amendment pass, would be that domestic partner benefits provided by any governmental employer could be challenged as unconstitutional.

Florida District Court of Appeal Ruled that Domestic Partner Benefits Do Not Create a Marriage-Like Relationship

In a similar case, another taxpayer, Lawrence Lowe, sued Broward County, claiming that the Broward County Domestic Partnership Act (DPA) was unconstitutional. The court rejected Mr. Lowe's constitutional challenge and entered final judgment in favor of Broward County. *See Lowe v. Broward County*, 6 Fla. L. Weekly Supp. 345 (Fla. 17th Cir. Ct. 1999).

On appeal, the District Court of Appeal considered whether the grant of domestic partner benefits was itself illegal. The court held that, by providing benefits to domestic partners, the DPA did not create a marriage-like relationship. *See Lowe v. Broward County*, 766 So. 2d 1199, 1206 (Fla. 4th DCA 2000). The court stated: "The Act does not reflect a legislative value judgment that elevates a non-traditional personal relationship to equal status with the marital relationship[.] . . . We disagree with Lowe's contention that the Act has created a 'new marriage-like relationship.' *Id.*

In addition, the court specifically found that the definition of the domestic partner relationship had nothing to do with the grant of employee benefits. The court stated: "Lowe points to similarities between domestic partnership and a marriage which are superficial[.]" *Lowe*, 766 So. 2d at 1206.

Instead of focusing on these superficial similarities, the court focused on the statutory rights and obligations exclusive to the traditional marriage relationship. For instance, the court pointed out that domestic partners under the DPA did not enjoy the right to jointly adopt, hold equal rights in property acquired during the relationship, hold property as tenancy by the entirety, and so on. *See id.* at 1205. Additionally, the court focused on the rights and obligations that survived the termination of the relationship. In a legal marriage, for instance, certain rights and obligations continue even after the dissolution of the marital relationship, though that is not the case in a domestic partnership under the act. *See id.* at 1202, 1206. In sum, because the DPA did not create the rights and obligations for domestic partners that were exclusive to the marital relationship, the DPA did not create a marriage-like relationship. The grant of domestic partner benefits, therefore, was not in and of itself illegal.

The proposed constitutional amendment is designed to circumvent this decision and prohibit employers from providing various protections, and employee health and other benefits.

States Where Similar Constitutional Amendments Have Been Used to Challenge Domestic Partner Benefits:

As previously mentioned, the proposed constitutional amendment could be used to challenge domestic partner benefits. This unfortunate conclusion is more than just a fear; it is a reality. Several states have recently passed constitutional amendments with language similar to that proposed in Florida. Relying on the new amendments, the first action in some of these states was to immediately terminate domestic partner health and other benefits to public employees.

Michigan:

The challenge to domestic partner benefits in Michigan (provided to same-sex couples only) is an example of what could happen should Florida voters pass the proposed constitutional amendment.

In November 2004, Michigan's constitution was amended to read: "[t]o secure and preserve the benefits of marriage for our society and future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25 (2004).

Supporters of Michigan's proposal to amend their state constitution endorsed the proposal as simply defining marriage as between a man and a woman and also argued it would not affect the benefits offered to individuals in a same-sex relationship. *See Prop 2 Supporters Should Keep Word on Allowing Partner Benefits*, THE DETROIT NEWS, Nov. 18, 2004. However, the supporters of the Michigan proposal did nothing to ensure that the amendment's language could not be used to deny these benefits to qualifying couples and their children.

The Michigan amendment has already become a vehicle to deny domestic partner benefits. Michigan's Governor, Jennifer Granholm has decided not to offer benefits to same-sex couples, even though the benefits were included in the state employees' new labor contracts, until a court rules on the legality of the benefits. *See Lawsuit Challenges Ann Arbor Schools' Same-Sex Benefits*, DETROIT FREE PRESS, Feb. 7, 2005.

Litigation has already begun attacking same-sex benefits provided by the Ann Arbor Public Schools. In 2003, prior to the vote to amend Michigan's constitution, the Thomas More Law Center, a Christian legal organization, and seventeen taxpayers filed a lawsuit in the Washtenaw County Circuit Court against the Ann Arbor Public Schools to prevent the school district from providing same-sex benefits. *See Lawsuit Challenges Ann Arbor Schools' Same-Sex Benefits*, DETROIT FREE PRESS, Feb. 7, 2005 (discussing *Rhode v. Ann Arbor Public Schools*). The circuit court found that the plaintiffs, the Christian law group and the taxpayers, lacked standing to sue. *Id.* The plaintiffs appealed the circuit court's ruling to the Michigan Court of Appeals. *Id.* On appeal, the plaintiffs cite the recent amendment as legal authority for the denial of same-sex benefits. *Id.* The citation to the amendment is a concrete illustration of how such sweeping language is used to inspire lawsuits for the purpose of denying health care benefits to qualifying domestic partners and their children.

Ohio:

Another state where domestic partner benefits are being challenged on the basis of a constitutional amendment barring same-sex marriage is Ohio.

Ohio's amendment, like the one proposed in Florida, contains sweeping language. The amendment not only states that marriage is between one man and one woman, but adds that the state "shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." OHIO CONST. art. XV, § 11 (2005).

This amendment is obviously not just a ban on marriage for same-sex couples — it was intended to have a broader sweep. The sponsors' clear motive was to end employee domestic partner benefits.

Ohio State Senator Jim Jordan has already initiated efforts to remove domestic partner benefits by trying to force the state universities to stop providing these benefits to their employees. *See* Eric Resnick, *Lawmaker May Try to Stop University Partner Benefits*, GAY PEOPLE'S CHRONICLE, Jan. 28, 2005. Currently, five state universities: Cleveland State, Miami University, Ohio University, Ohio State University and Youngstown State, offer benefits to the domestic partners of employees. *Id.* Senator Jordan has been consulting with attorneys to determine the possible ways to make the universities comply—including a plan to change the state budget, which would affect the legislatively funded universities. *Id.* The universities have signaled that they will continue to offer the benefits, regardless of the constitutional amendment, until a court orders them to stop. *Id.* Many believe that a court battle is not far off.

In addition to many public employees, some of the largest Ohio corporations, including Procter & Gamble, NCR and Federated Department Stores, offer benefits to domestic partners. *See* Anthony Glassman, *Moen Joins List of Ohio Firms With Partner Benefits*, GAY PEOPLE'S CHRONICLE, Jan. 28, 2005.

Ohio also saw perhaps one of the most chilling developments of all: a man accused of domestic violence cited the amendment as a defense, saying the law did not protect his live-in girlfriend whom he had beaten, because she was not married to him. The judge threw out the argument because the battery occurred before the date of the amendment, but the defense has already been asserted in subsequent cases.

Domestic Partner Benefits Currently Provided in Florida:

Should the proposed amendment pass in Florida, the effect on domestic partner benefits may be widespread. Currently, several counties, including Broward and Monroe, and municipalities, including Gainesville, Key West, Miami Beach, and West Palm Beach, offer domestic partner benefits to their employees. In addition, several public universities and community colleges offer these benefits. Challenges to these benefits could strip employees and their families of benefits they have been receiving and relying upon.

A Threat to Domestic Partner Benefits in the Private Sector:

The language of the proposed amendment to the Florida Constitution will be used by its backers to assault domestic partner benefits in the private sector. The proposed amendment itself makes no distinction between public and private employers. Approximately 228 of the Fortune 500 companies and 7,615 private sector companies in the United States currently offer domestic partner health benefits. For example, this list includes companies such as American Airlines, AT&T Corp., Ford Motor Co., Hewlett-Packard Co., IBM Corp., Miller Brewing Co., and Pepsico. Private universities, such as Nova Southeastern University, University of Miami, and Stetson University offer domestic partner benefits. Along with the university employees, many of these companies' employees live in Florida and could be harmed if the proposed amendment was interpreted to reach into the private sector.

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