LEGAL LIMBO

Gay and Lesbian Family Law Issues

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Florida Statutes, § 63.042 (2010)

Who may be adopted; who may adopt.

(1) Any person, a minor or an adult, may be adopted.

(2) The following persons may adopt:

(a) A husband and wife jointly;

(b) An unmarried adult; or

(c) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his or her spouse, and if:

1. The other spouse is a parent of the person to be adopted and consents to the adoption; or

2. The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best interest of the child.

(3) No person eligible to adopt under this statute may adopt if that person is a homosexual.

(4) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the court or adoption entity that such disability or handicap renders such person incapable of serving as an effective parent.

ACLU - Fighting Florida's Gay Adoption Ban

Florida Department of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G., 45 So.2d 3d 79 (Fla. 3rd DCA 2010)

The question in the case is whether the adoption should have been denied because F.G. is a homosexual. Under Florida law, a homosexual person is allowed to be a foster parent. F.G. has successfully served as a foster parent for the children since 2004. However, Florida law states, "No person eligible to adopt under this statute [the Florida Adoption Act] may adopt if that person is a homosexual." § 63.042(3), Fla. Stat. (2006). According to the judgment, "Florida is the only remaining state to expressly ban all gay adoptions without exception." Judgment at 38. Judge Cindy Lederman, after lengthy hearings, concluded that there is no rational basis for the statute. We agree and affirm the final judgment of adoption.

Florida Department of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G., 45 So.2d 3d 79 (Fla. 3rd DCA 2010)

In conclusion on the equal protection issue, the legislature is allowed to make classifications when it enacts statutes. Leicht, 402 So. 2d at 1155. As a general proposition, a classification "will be upheld even if another classification or no classification might appear more reasonable." *Id*. The classifications must, however, be "based on a real difference which is reasonably related to the subject and purpose of the regulation." Id. (Emphasis added). "The reason for the equal protection clause was to assure that there would be no second class citizens." Osterndorf v. Turner, 426 So. 2d 539, 545-46 (Fla. 1982). Under Florida law, homosexual persons are allowed to serve as foster parents or guardians but are barred from being considered for adoptive parents. All other persons are eligible to be considered case-by-case to be adoptive parents, but not homosexual persons--even where, as here, the adoptive parent is a fit parent and the adoption is in the best interest of the children.The Department has argued that evidence produced by its experts and F.G.'s experts supports a distinction wherein homosexual persons may serve as foster parents or guardians, but not adoptive parents. Respectfully, the portions of the record cited by the Department do not support the Department's position. We conclude that there is no rational basis for the statute.

Orlando Sentinel | ARTICLE COLLECTIONS

October 22, 2010| By Victor Manuel Ramos, Orlando Sentinel

In his statement, McCollum said that, while he still believes that the law's constitutionality should be brought to the Florida Supreme Court, he was not pursuing the case because the state's Department of Children and Families had decided not to challenge the ruling.

"The constitutionality of the Florida law banning adoption by homosexuals is a divisive matter of great public interest," McCollum said. "…It is clear that this is not the right case to take to the Supreme Court for its determination."

However, McCollum left the door open for future legal jostling over gay adoptions, saying that "someday a more suitable case will give the Supreme Court the opportunity to uphold the constitutionality of this law."

Pam Bondi "refuses to take a position on the gay-adoption ban."

John Stemberger on Sunday, August 8th, 2010 in an endorsement letter

Going straight to the source, we asked Bondi her position on the issue and she responded with an e-mail stating: "As Florida's next attorney general, I will vigorously defend Florida's law banning gay adoption in our state. As a veteran prosecutor who has spent her entire career upholding the laws of this state, I have the training and experience necessary to successfully defend our laws in a courtroom."

Cole v. Arkansas

On April 11, 2011, the Arkansas Supreme Court struck down the following law (passed in 2008 on a ballot initiative) on federal and state equal protection and due process grounds:

Act 1:

(a) A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of this state.

(b) The prohibition of this section applies equally to cohabiting opposite-sex and same-sex individuals.

Gay Marriage Around the World

ANALYSIS July 9, 2009

Hawaii

- **1993** *Baehr v. Lewin*: Hawaii's high court issues first-of-a-kind ruling that a barrier to marriage is discrimination, launching the freedom to marry movement.

- **1996** *Baehr v. Miike:* Trial court conducts a full trial, complete with expert witnesses testifying on the state's reasons for denying marriage, and finds that those reasons lack merit, meaning that the same-sex couples are entitled to marriage licenses.

- **1998** Hawaii amends its constitution with regard to marriage by exempting same-sex couples from protection of equality guarantee, giving legislature the power to define marriage as limited to a man and a woman. **Section 23.** The legislature shall have the power to reserve marriage to opposite-sex couples. [Add HB 117 (1997) and election Nov 3, 1998]

- **1999** *Baehr v.Miike*: Hawaii's high court rules that Hawaii's constitution no longer protects lesbian and gay individuals with regard to their freedom to marry.

Defense of Marriage Act

Acronym	DOMA
Enacted by the	104th United States Congress
Citations	
Public Law	104-199 [1]
Stat.	110 Stat. 2419 (1996)
Codification	
Legislative history [2]	

- **Introduced in the House of Representatives as** H.R. 3396 **by** Robert L. Barr, Jr. **on** May 7, 1996
- **Committee consideration by:** Committee on the Judiciary (Subcommittee on the Constitution)
- **Passed the House on** July 12, 1996 (Yeas: 342; Nays: 67 [3])
- **Passed the Senate on** September 10, 1996 (Yeas: 85; Nays: 14 [4])
- **Signed into law by President** Clinton **on** September 21, 1996

Major amendments
Relevant Supreme Court cases
None

DOMA

The following excerpts are the main provisions of the Act:

- Section 2. Powers reserved to the States: No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

- Section 3. Definition of marriage: In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

GETTY IMAGES

Gill and Massachusetts (DOMA Challenges)

On July 8, 2010, Judge Tauro issued his rulings in both *Gill* and *Massachusetts*, granting summary judgment for the plaintiffs in both cases. He found in *Gill* that Section 3 of the Defense of Marriage Act violates the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In *Massachusetts* he held that the same section of DOMA violates the Tenth Amendment and falls outside the authority of Congress under the Spending Clause of the Constitution. Those decisions were automatically stayed for two weeks by federal court rules and were stayed further after the Department of Justice entered an appeal on October 12, 2010.

Obama Administration

On February 23, 2011, Attorney General Eric Holder released a memo regarding two lawsuits challenging DOMA Section 3, Pedersen v. OPM and Windsor v. United States. He said: "After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases."

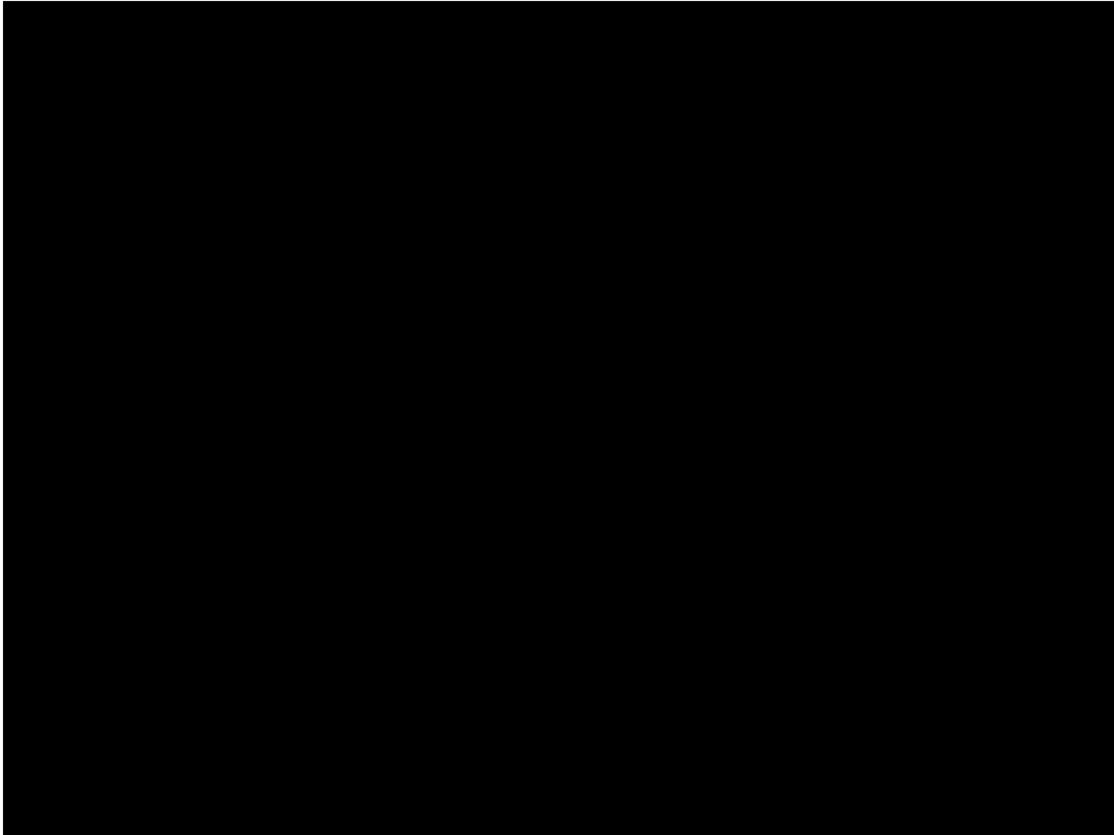
California

- The California Supreme Court, in the matter known as “Re: Marriage Cases,” rules that the statutory provision which prohibited gay marriage violated the California Constitution.

- On November 4, 2008, proposition 8 was passed, and California’s constitution was amended to prohibit the provision of marriage licenses to gays and lesbians.

- On May 15, 2009, the California Supreme Court, in Strauss v. Horton, upheld the constitutionality of the amendment.

California



States Which Recognize Gay Marriage

- **Massachusetts**. On November 18, 2003, in the matter of Goodridge v. Department of Public Health, 440 Mass. 309, the court held that banning gay marriage arbitrarily infringed on the personal freedoms of the individuals.

- **Connecticut**. On October 10, 2008, the Connecticut Supreme Court held that prohibiting gay marriage violated the litigant's equal protection rights.

- **Iowa**. On April 3, 2009, the Supreme Court of Iowa, in Varnum v. Brien, stated that there was no compelling government interest in denying gays and lesbians the rights to marry.

- **Vermont**. On April 7, 2009, the Vermont legislature passed the, "Act to Protect Religious Freedom and Recognize Equality in Civil Marriage" wherein, the legislature legalized access to marriage for gays and lesbians.

- **Maine**. On May 6, 2009, Governor John E. Baldacci signed into law LD 1020 entitled "An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom" which extended marriage rights to homosexual couples.

- **New Hampshire**. On June 3, 2009, New Hampshire's Governor John Lynch executed HB 0436 which was a bill that permitted equal access to marriage for same sex couples.

October 10, 2008

By a vote of 4-3, the Connecticut Supreme Court, Justice Richard Palmer for the majority wrote:

"We conclude that, in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm."

Florida Statutes § 741.212 (2010)

Marriages between persons of the same sex.

(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.

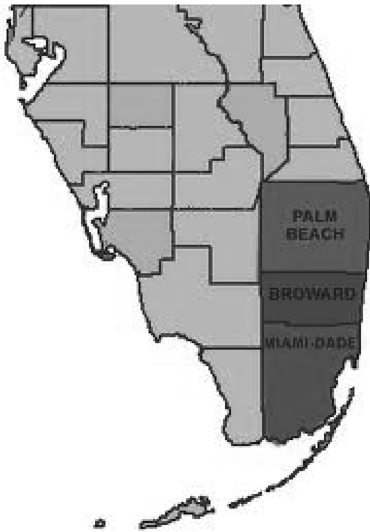
- History.—s. 1, ch. 97-268.

Florida Constitution, Article 1, Section 27

Marriage defined. 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.

History.—Proposed by Initiative Petition filed with the Secretary of State February 9, 2005; adopted 2008.

County Websites – Applications, Fees and Requirements for Domestic Partnership Registration



www.pbchrc.org

www.broward.org

www.miamidade.gov

Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey (October 2006)

- Between 2000 – 2005, the number of Same-Sex Couples increased 34% in the State of Florida.
- Specifically, between 2000 and 2005, the number of same-sex couples increased from 41,048 to 54,929.
- In 2005, the State of Florida ranked second nationally in the number of Gay, Lesbian and Bisexual residents – 609, 219.
- In 2005, the Miami/Fort Lauderdale metropolitan area ranked 8th nationally in terms of its Gay, Lesbian and Bisexual population base.
- In 2005, Tampa and Orlando were added to list of top ten cities based on their respective percentages of Gay, Lesbian and Bisexual residents.

Lowe v. Broward County, 766 So.2d 1199(Fla. 4th DCA 2000)

- This case concerns the constitutionality of the Broward County Domestic Partnership Act under Article VIII, Section 1(g) of the Florida Constitution. Except for one section which is severable from the Act, we hold that the ordinance is constitutional.

Proposed Legislation Florida Legislature

- House Bill 337/ Senate Bill 34
- **Domestic Partnerships:** Sets fees & costs for dissolution or registration of domestic partnership; requires DOH to examine certificates of domestic partnership & dissolution reports; requires clerk to transmit declarations of domestic partnership; authorizes DOH to issue certified copy of certain vital records to domestic partner; includes domestic partnership within domestic violence provisions; requires DOH to create & distribute forms; provides jurisdiction over partnership proceedings; requires partnership registry; requires form to be filed to form partnership & specifies contents; authorizes partners to retain surnames; provides that any privilege or responsibility granted or imposed by statute, administrative or court rule, policy, common law, or any other law because individual is or was related to another by marriage, or is child of either spouse, is granted on equivalent terms to domestic partners or individuals similarly related to domestic partners; provides exceptions; provides methods to prove existence of partnership when certificate is lost or unavailable; provides for termination of partnership
- Saturday, May 7, 2011 12:01 AM "Indefinitely postponed and withdrawn from consideration."
- http://www.mfhmobile.com/Bill/BillDirectDetail/45203

Posik v. Layton, 695 So.2d 759 (Fla. 5th DCA 1997)

Certainly, even though the agreement was couched in terms of a personal services contract, it was intended to be much more. It was a nuptial agreement entered into by two parties that the state prohibits from marrying. But even though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement. By prohibiting same-sex marriages, the state has merely denied homosexuals the rights granted to married partners that flow naturally from the marital relationship. In short, "the law of Florida creates no legal rights or duties between live-ins." Lowry v. Lowry, 512 So. 2d 1142 (Fla. 5th DCA 1987). (Sharp, J., concurring specially). This lack of recognition of the rights which flow naturally from the break-up of a marital relationship applies to unmarried heterosexuals as well as homosexuals. But the State has not denied these individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose. The State is not thusly condoning the lifestyles of homosexuals or unmarried live-ins; it is merely recognizing their constitutional private property and contract rights. Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations. Other states have approved such individual agreements.

Dietrich v. Winters, 798 So.2d 864 (Fla. 4th DCA 2001)

Appellee is not without a remedy, however. Agreements between unmarried parties may be enforced provided there is valid and lawful consideration apart from any express or implied agreement regarding sexual relations. See Stevens v. Muse, 562 So. 2d 852, 853 (Fla. 4th DCA 1990). In Stevens, this court granted a petition for certiorari and quashed the circuit court's opinion affirming the trial court's decision that an agreement between a cohabiting unmarried couple was unenforceable. See also Poe v. Levy's Estate, 411 So. 2d 253, 256 (Fla. 4th DCA 1982) ("a cause of action based on an express contract or for construction of a trust is enforceable regardless of the fact that the parties may be cohabiting illicitly as long as it is clear that there was valid, lawful consideration"). An oral agreement between cohabiting parties, if proved, is enforceable. Crossen v. Feldman, 673 So. 2d 903 (Fla. 2d DCA 1996).

Forrest v. Ron, 821 So.2d 1163 (Fla. 3d DCA 2002)

It is well settled that "[a] cause of action based on an express contract . . . is enforceable regardless of the fact that the parties may be cohabiting illicitly as long as it is clear there was valid, lawful consideration separate and apart from any express or implied agreement, regarding sexual relations." *Poe v. Estate of Levy*, 411 So. 2d 253, 256 (Fla. 4th DCA 1982); *Dietrich v. Winters*, 798 So. 2d 864 (Fla. 4th DCA 2001); *Posik v. Layton*, 695 So. 2d 759 (Fla. 5th DCA 1997); *Crossen v. Feldman*, 673 So. 2d 903 (Fla. 2d DCA 1996); *Stevens v. Muse*, 562 So. 2d 852 (Fla. 4th DCA 1990); *Evans v. Wall*, 542 So. 2d 1055 (Fla. 3d DCA 1989)(court awarded funds to co-habitant on constructive trust theory).

Jacoby v. Jacoby, 763 So.2d 410 (Fla. 2nd DCA 2000)

For a court to properly consider conduct such as Mrs. Jacoby's sexual orientation on the issue of custody, the conduct must have a direct effect or impact upon the children. *See Maradie v. Maradie*, 680 So. 2d 538 (Fla. 1st DCA 1996). "The mere possibility of negative impact on the child is not enough." *Id.* at 543. The connection between the conduct and the harm to the children must have an evidentiary basis; it cannot be assumed. *See id.* We have reviewed the court's comments concerning the negative impact of the mother's sexual orientation on the children, and have found them to be conclusory or unsupported by the evidence.

Wakeman v. Dixon, 921 So.2d 669 (Fla. 1st DCA 2006)

Mary L. Wakeman appeals a final order dismissing with prejudice her amended complaint seeking to enforce several agreements with Dene' B. Dixon, appellee, under which appellant argued she was granted certain parental rights and responsibilities, including visitation, with respect to two minor children born to Dixon. We agree with the trial court that, under Florida law, absent evidence of detriment to the child, courts have no authority to grant custody or to compel visitation by a person who is not a natural parent and that agreements providing for visitation by a non-parent are unenforceable. Accordingly, we affirm.

Peterman v. Meeker, 855 So.2d 690 (Fla. 2d DCA 2003)

In accordance with the definition of family or household members under Florida Statutes § 741.30 (2010) and § 741.28 (2010) , "spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married" included homosexual couples notwithstanding that they were prohibited from marrying under Florida Law.