[Cite as *Cleveland Taxpayers for Ohio Constitution v. Cleveland*, 2010-Ohio-4685.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94327

CLEVELAND TAXPAYERS FOR OHIO CONSTITUTION, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-701308

BEFORE: Cooney, J., Gallager, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: September 30, 2010

ATTORNEYS FOR APPELLANTS

David R. Langdon
Bradley M. Peppo
Langdon Law LLC
11175 Reading Road, Suite 104
Cincinnati, Ohio 45241-1997

James A. Campbell
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260

ATTORNEYS FOR APPELLEE

Robert J. Triozzi
Director of Law
City of Cleveland
By: Michael F. Cosgrove
Gary S. Singletary
Assistant Directors of Law
Cleveland City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114-1077

AMICI CURIAE

For ACLU

Carrie L. Davis
American Civil Liberties Union
of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103

For Lambda Legal Defense & Education Fund

Timothy R. Carraher
Christopher R. Clark
11 East Adams
Suite 1008
Chicago, IL 60603

Melissa A. Majkut
Porter Wright Morris & Arthur
925 Euclid Avenue
Suite 1700
Cleveland, Ohio 44115

Kathleen M. Trafford
Porter Wright Morris & Arthur
41 South High Street
Columbus, Ohio 43215

COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, Dorothy McGuire ("McGuire"), on behalf of the city of Cleveland taxpayers, appeals the trial court's denial of her request for a statutory injunction enjoining the operation of a domestic partner registry ordinance established by the city of Cleveland ("Cleveland"). The American Civil Liberties Union of Ohio Foundation, Inc. ("ACLU") and the Lambda Legal Defense and Education Fund ("Lambda"), were permitted to file briefs as amicus curiae

urging affirmance of the trial court's decision. We find no merit to the appeal and affirm.

{¶ 2} On December 8, 2008, Cleveland enacted Ordinance No. 1745-08, which created Cleveland's domestic partnership registry.[1] Pursuant to the ordinance, couples may file a declaration of domestic partnership and be placed in a registry provided they (1) pay a fee, (2) share a common residence, (3) agree to be in a relationship of mutual interdependence, (4) are not married to another individual, (5) neither individual is part of an existing domestic partnership with another person, (6) are 18 years of age or older, and (7) are not related by blood in a way that would prevent them from being married in Ohio. The ordinance also prescribes the filing, terminating, and registering of domestic partnerships.

{¶ 3} The ordinance became effective on May 7, 2009. That same day, McGuire, representing the taxpayers and residents of Cleveland, wrote to the

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[1] The establishment of domestic partnership registries are common. Cities and small towns throughout the United States have established similar schemes. Some of the cities and counties offering domestic partner registries include: Ann Arbor, MI; Athens-Clarke County, GA; Atlanta, GA; Boulder, CO; Brookline, MA; Broward County, FL; Carrboro, NC; Chapel Hill, NC; Cleveland Heights, OH; Cook County, IL; Davis, CA; Denver, CO; Eugene, OR; Eureka Springs, AR; Fulton County, GA; Hartford, CT; Iowa City, IA; Ithaca, NY; Kansas City, MO; Key West, FL; Lacey, WA; Laguna Beach, CA; Long Beach, CA; Los Angeles County, CA; Madison, WI; Marin County, CA; Miami Beach, FL; Milwaukee, WI; Minneapolis, MN; Nantucket, MA; New York, NY; Oak Park, IL; Oakland, CA; Olympia, WA; Palo Alto, CA; Palm Springs, CA; Petaluma, CA; Philadelphia, PA; Portland, ME; Rockland County, NY; Rochester, NY; Sacramento, CA; Seattle, WA; St. Louis, MO; Travis County, TX; Tucson, AR; Tumwater, WA; and Urbana, IL. Human Rights Campaign, "Search by City and State for Domestic Partner Registries" <http://www.hrc.org/issues/marriage/domestic_partners/9133.htm>.

Cleveland Law Director requesting that he bring an action in the name of the City to enjoin the operation of the ordinance as an abuse of the corporate powers of the City, as provided in R.C. 733.56. The Law Director did not respond to the request, and McGuire instituted this action as a taxpayer action under R.C. 733.59, seeking an injunction to restrain what she believes to be an abuse of corporate powers caused by the enactment and implementation of Cleveland's domestic partner registry.

{¶ 4} In September 2009, Cleveland filed a motion to dismiss pursuant to Civ.R. 12(B)(6). After briefing, on November 3, 2009, the trial court granted Cleveland's motion to dismiss and denied McGuire's motion for preliminary and permanent injunctions. McGuire, on behalf of the Cleveland taxpayers, now appeals raising one assignment of error.

{¶ 5} In her sole assignment of error, McGuire argues the trial court erred in dismissing her complaint and denying her request for a statutory injunction enjoining Cleveland's operation of its domestic partner registry ordinance, Cleveland Codified Ordinances Chapter 109 ("C.C.O. Chapter 109"). She claims the domestic partner registry violates the Marriage and Home Rule Amendments of the Ohio Constitution.

{¶ 6} An appellate court reviews a Civ.R. 12(B)(6) motion to dismiss de novo. *Greely v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. A motion to dismiss for failure to state a claim upon which

relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 1992-Ohio-73, 605 N.E.2d 378. The trial court may review only the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. Moreover, the court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. The court need not, however, presume the truth of "unsupported conclusions." *Mitchell* at 193.

{¶ 7} McGuire's complaint challenges the constitutionality of Cleveland's domestic partner registry ordinance. All legislation, including municipal ordinances, are entitled to a strong presumption of constitutionality and the party challenging the constitutionality of a law "'bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.'" *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 446, ¶11, quoting *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶41. Further, courts liberally construe a statute in order to save it from constitutional infirmities. *Lebanon v. McClure* (1988), 44 Ohio App.3d 114, 116, 541 N.E.2d 1073. "[I]f by any fair course of reasoning, the law and the

constitution can be reconciled, the law must stand." *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶9. Accordingly, we begin our analysis with the strong presumption that Cleveland's domestic partner registry ordinance is constitutional.

The Marriage Amendment

{¶ 8} McGuire contends the enactment and implementation of the domestic partner registry violates Section 11, Article XV of the Ohio Constitution, commonly known as the "Marriage Amendment." The "Marriage Amendment," states:

> "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions 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."

{¶ 9} McGuire and the taxpayers argue that Cleveland's domestic partner registry violates the Marriage Amendment because it bestows legal recognition to domestic partnerships that are intended to approximate some, if not all, of the four aspects of marriage enumerated in the Marriage Amendment: its design, its qualities, its significance, or its effect. In other words, McGuire contends that even if the domestic partnerships recognized by the domestic partner registry approximate just some of the enumerated aspects of marriage, then the domestic partner ordinance is unconstitutional. We disagree.

{¶ 10} The Ohio Supreme Court interpreted the second sentence of the Marriage Amendment in *Carswell,* in which the defendant was charged with domestic violence. Carswell argued that Ohio's domestic violence statute, which included longer prison sentences for acts of violence against family members and those "living as spouses," was unconstitutional under the amendment because it recognized a "legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." In rejecting Carswell's broad interpretation of the Marriage Amendment, the Supreme Court explained the difference between the institution of marriage and other kinds of relationships:

> "[B]eing married is a status. Marriage gives a person certain legal rights, duties, and liabilities. For example, a married person may not testify against his or her spouse in some situations. R.C. 2945.42. A married person may inherit property from a spouse who dies intestate. R.C. 2105.06. The definition of 'status,' our understanding of the legal responsibilities or marriage, and the rights and duties created by the status of being married, combined with the first sentence of the amendment's prohibition against recognizing any union that is between persons other than one man and one woman, causes us to conclude that the second sentence of the amendment means that *the state cannot create or recognize a legal status for unmarried persons that bears all the attributes of marriage — a marriage substitute*."

(Emphasis added.) Id. at ¶13. Thus, the Ohio Supreme Court explained that any legally established relationship bearing less than all the attributes of marriage is constitutional.

{¶ 11} The legal status of marriage is exceptional. Marriage automatically provides instant access to an extensive legal structure designed to protect the couple's relationship and to support the family in a variety of ways. The domestic partner registry, by contrast, is much more limited in its scope and bears almost none of the attributes of marriage. The domestic partner registry does not create any causes of action nor does it confer any legal benefits. In *Carswell*, the court observed that only partners to a marriage have a spousal privilege, which protects one spouse from being compelled to testify against the other spouse, and that only a married person may inherit property from a spouse who dies intestate. Id. at ¶13.

{¶ 12} Although the domestic partner registry places upon domestic partners, if they wish to continue the relationship, the marital duties to "share a common residence," to maintain a "committed relationship," and to "share responsibility for each other's common welfare," unlike a marriage, there is no method of enforcement for these provisions. Domestic partners who separate cannot take advantage of the domestic relations laws that govern divorce, alimony, child support, child custody, and equitable distribution, i.e., R.C. Chapter 3105. Although the ordinance requires that domestic partners share a residence and must be at least 18 years of age, the marriage statutes impose no cohabitation requirement and women are permitted to marry at the age of 16. R.C. 3101.01.

{¶ 13} Similarly, domestic partners, like married persons, are prohibited by the ordinance from entering another domestic relationship with a third person until any previously existing partnership is terminated. However, the only enforcement mechanism available to ensure compliance is the inability to register as a domestic partner with a new partner. The domestic relations laws, which protect individuals in divorce, are not available to protect one domestic partner's property interests vis-a-vis the other. Moreover, unlike a marriage that is "not terminable at the will of either party or by their mutual agreement," *Langer v. Langer* (1997), 123 Ohio App.3d 348, 353, 704 N.E.2d 275, domestic partners may have their names removed from the Registry simply by filing a Notice of Termination with Cleveland's Division of Assessments and Licenses. C.C.O. 109.05(b). Such notice is effective upon filing pursuant to C.C.O. 109.05(c), unlike a divorce, which requires the filing of a complaint for divorce or legal separation and a court's granting of the divorce. R.C. 3105.17.

{¶ 14} The domestic partner registry bestows upon domestic partners, like married persons, the legal right of being registered and recognized as a domestic unit. This legal recognition, in and of itself, is meaningful to the domestic partners. However, as stated in the Lambda's amicus brief, the term "'domestic partner' completely lacks the social and emotive resonance of 'husband' and 'wife.'" Domestic partnerships are not given the same respect by society as a married couple, and they share none of marriage's history and traditions.

{¶ 15} Domestic partners are not entitled to numerous other spousal benefits, including, but not limited to: (1) the marital exemption from paying any estate tax on inheritance from a spouse, R.C. 5731.161; (2) a guaranteed share of an intestate spouse's estate, R.C. 2105.06; (3) the right to file joint tax returns, R.C. 5747.08; (4) the right to receive worker's compensation benefits when the spouse dies, R.C. 4123.59; (5) the right to bring a wrongful death action on behalf of one's deceased spouse, R.C. 2125.02; and (6) making medical decisions for an incapacitated spouse, R.C. 2133.08(B). McGuire disregards these considerable differences between marriage and domestic partners who register in Cleveland's domestic partner registry. At most, the domestic partner registry allows two people the legal right to be registered and recognized as a domestic unit, which may help local businesses and private employers more easily identify those couples who may qualify for domestic partnership benefits provided by such entities. In our view, Cleveland's domestic partner registry is, in essence, simply a label that confers little or no legal benefits on the domestic partners and thus does not "approximate the design, qualities, significance or effect of marriage."

{¶ 16} Therefore, we find that Cleveland's domestic partner registry ordinance, C.C.O. Chapter 109, does not violate the Marriage Amendment, Section 11, Article XV of the Ohio Constitution.

Home Rule

{¶ 17} McGuire also contends that Cleveland's domestic partner registry is unconstitutional because it is an abuse of Cleveland's corporate powers conferred by Section 3, Article XVIII of the Ohio Constitution, otherwise known as the Home Rule Amendment. The Home Rule Amendment provides, in pertinent part:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

{¶ 18} A home rule analysis presents a three-step process. *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶9. In determining whether a municipality has exceeded its powers under the Home Rule Amendment, we must first determine whether the ordinance is an exercise of police power, rather than local self-government. Id. If the ordinance relates solely to self-government, the analysis stops because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction. *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶23-24.

{¶ 19} If, however, the ordinance pertains to "local police, sanitary and other similar regulations," Section 3, Article XVIII, Ohio Constitution, the municipality will have exceeded its home rule authority only if the ordinance is in conflict with a

general state law. *Mendenhall v. Akron,* 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶18. In *Mendenhall*, the court explained:

> "If that ordinance does not relate to local self-government, the second part of the test examines the state statute to determine whether it is a general law. If the statute is not a general law, the ordinance will not be invalidated. Only when the municipality has not exercised a power of self-government and when a general state law exists do we finally consider the third part of the test, whether the ordinance is in conflict with the general law."

Id.

{¶ 20} McGuire asserts that the domestic partner registry violates the Home Rule Amendment because it is neither a police power nor a purely governmental function.[2] McGuire argues that legislation pertaining to self-government must relate solely to the government and administration of its internal affairs and that the domestic partner registry has nothing to do with municipal operations. In support of this argument, McGuire cites *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, and *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, 880 N.E.2d 906, for the proposition that an ordinance created under the power of local self-government must relate "solely to the government and administration of the internal affairs of the municipality." *Marich* at ¶11, quoting *Beachwood v. Cuyahoga Cty. Bd. of Elections* (1958), 167 Ohio St. 369, 5 O.O.2d 6, 148 N.E.2d 921, paragraph one

[2] Cleveland does not argue that the domestic partner registry is a product of its police power.

of the syllabus. Taken out of context, this citation seems to limit municipal powers of self-government to only those matters involving the operation of the municipal government. However, both cases cited by McGuire involve legislation related to municipal police powers and do not discuss any test for determining the propriety of legislation relating to self-government.

{¶ 21} Nevertheless, both cases quote *Beachwood*, which discusses the Home Rule Amendment in the context of self-government legislation. In *Beachwood*, the Ohio Supreme Court set forth the following test for determining whether local legislation is a valid act of self-government:

> "Where a proceeding is such that it affects not only the municipality itself but the surrounding territory beyond its boundaries, such proceeding is no longer one which falls within the sphere of local self-government but is one which must be governed by the general law of the state.
>
> "To determine whether legislation falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extra-territorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly."

Beachwood at 371.

{¶ 22} In *Cleveland Hts. ex. rel. Hicks v. Cleveland Hts.*, 162 Ohio App.3d 193, 2005-Ohio-3582, 832 N.E.2d 1275, this court previously found that a municipal domestic partner registry is within a city's local authority. In *Hicks*, the city of Cleveland Heights created a registry almost identical to the one at issue

here, and it was challenged on grounds that it exceeded the city's home rule authority under Section 3, Article XVIII of the Ohio Constitution. In finding that the registry was within the city's home rule authority, this court held:

> "The city allows residents and nonresidents alike to register. However, the city of Cleveland Heights confers no benefit, right or obligation upon those registering. The taxpayers of the city incur no cost since the registering couples pay a fee to cover the entire cost of the registry. A nonresident must pay the same fee but obtains no benefit aside from their names on the registry. Foreign jurisdictions are not bound to acknowledge the registry or to confer any rights or obligations. Residents and nonresidents are free to recognize the declaration, but no other city is obligated to take notice. The registry does not create any result, either within the city or outside its territory, other than the mere existence of names on a list. Therefore, the court, applying the territorial test established in *Beachwood*, finds the city of Cleveland Heights' Domestic Registry to be an act of self-governance."

Hicks at ¶15.

{¶ 23} This court further found that the mere fact that private entities may choose to accord benefits to couples who register does not change the determination that the registry was within the city's authority. "We recognize the ordinance may enable registered couples to obtain certain ancillary benefits such as employee benefits from certain businesses; however, the ordinance itself confers no legal benefit upon the registrants." *Hicks* at fn. 1.

{¶ 24} Cleveland's domestic partner registry ordinance is nearly identical to the domestic partner registry previously upheld by this court in *Hicks*. It conveys no rights, is open to residents and nonresidents, is completely paid for by the applicants' fees so the City bears no cost, and no public or private entity is

obligated to recognize it. Therefore, like *Hicks*, we find that Cleveland's domestic partner registry is within Cleveland's home rule authority.

{¶ 25} Accordingly, the sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY