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ATTORNEY GENERAL OPINION NO. 2007- 9

Toni Ramirez Wheeler
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Lawrence, Kansas 66044

Re: Constitution of the State of Kansas--Corporations--Cities' Powers of Home Rule; City's Establishment of Domestic Partnership Registry

Constitution of the State of Kansas--Miscellaneous--Marriage; City's Establishment of Domestic Partnership Registry

Synopsis: The City of Lawrence proposed Ordinance No. B, establishing a domestic partnership registry, does not conflict with nor is it preempted by Article 15, Section 16 of the Kansas Constitution or statutes establishing the marital relationship. However, to the extent that the registry is available to individuals who do not reside in the City of Lawrence, the ordinance extends beyond the purview of the city's local affairs and, as such, may be found to violate the Home Rule Amendment to the Kansas Constitution. Cited herein: K.S.A. 2006 Supp. 23-101; K.S.A. 23-102; 60-1601; Kan. Const., Art. 12, § 5, Art. 15, § 16.

* * *

Dear Ms. Wheeler:

On behalf of the governing body of the City of Lawrence, you inquire whether a proposed ordinance establishing a domestic partnership registry "is lawful in Kansas." Because it is impossible to address all of the potential legal challenges to any ordinance, and in the absence of a more specific query, our focus will be limited to whether this proposed ordinance is within the City's constitutional home rule authority and, in that context, whether it runs afoul of the recent amendment to the Kansas Constitution regarding marriage and non-marital relationships.[1]

[1]Kan. Const. Art. 15, § 16.

I. The Proposed Ordinance

Proposed Ordinance No. B creates a domestic partnership registry allowing "domestic partners" to register with the City of Lawrence. The salient provisions include the following:

1. "Domestic partners" are defined as unmarried individuals who are at least 18 years old, have the mental capacity to contract, and "who live together in a relationship of indefinite duration, with a mutual commitment in which the partners share the necessities of life and are financially interdependent."[2] Domestic partners cannot have another domestic partner and cannot be related by blood, such that any marriage would be void.[3]

2. Residency in the City of Lawrence is not a requirement to register. A registration fee is charged.

3. Once registered, a domestic partnership can be removed from the registry in accordance with the ordinance and procedures developed by the City Manager.[4]

4. The registration "creates no legal rights, other than the right to have the registered domestic partnership included in the City's Domestic Partner Registry. . . ."[5]

5. The ordinance is not to be "interpreted [or] construed to permit the recognition of a relationship that is otherwise prohibited by State law."[6]

A review of the testimony and discussion at the City Commission meeting on January 9, 2007 reveals that the impetus for this proposed ordinance is to facilitate private employers' extension of insurance and other employment benefits to domestic partners of employees. The testimony presented to the City Commission indicates that this willingness on the part of some employers is extended only if the partnership is documented by a state or local governmental entity.[7] Additionally, testimony offered by proponents evinces no desire to extend or mandate benefits as a consequence of the registry but simply to "provide . . . recognition . . . that Lawrence welcomes and embraces its alternative families."[8]

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[2]Ordinance No. B, §10-201.

[3]K.S.A. 23-102.

[4]Ordinance No. B, §§10-204, 10-205(A).

[5]*Id.* at §10-206.

[6]*Id.* at §10-207.

[7]*Minutes,* Board of Commissioners/City of Lawrence, January 9, 2007. *See* Testimony of City of Lawrence Mayor Mike Amyx/House Committee on Federal & State Affairs/2007 H.B. 2299 (February 15, 2007).

[8]*Id.* at p. 20.

You indicate that numerous cities throughout the United States provide such registries with some cities requiring residency and others not.[9] The City's proposed ordinance is modeled after an ordinance enacted by the City of Cleveland Heights, Ohio[10] that was upheld by a state appeals courts after being challenged as outside the purview of Ohio's Home Rule Amendment.[11]

II. The Kansas Home Rule Amendment

With this background in mind, we now examine whether proposed Ordinance No. B falls within the City's home rule powers. The Home Rule Amendment[12] provides, in part:

> "(b) Cities are hereby empowered to determine their local affairs and government. . . . [Cities] shall exercise such determination by ordinance passed by the governing body . . . subject only to . . . enactments of the legislature applicable uniformly to all cities. . . .
>
> . . . .
>
> "(d) Powers and authorities granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government."

Proposed Ordinance No. B is an "ordinary ordinance" for purposes of Home Rule analysis, as opposed to a "charter ordinance" that "opts out" of a nonuniform enactment.[13] Charter ordinances are governed by a different provision of the Home Rule Amendment[14] than the provision at issue here.

In *Kansas City Renaissance Festival Corp. v. City of Bonner Springs,*[15] the Kansas Supreme Court considered the parameters of the Home Rule Amendment in the context of an ordinary ordinance imposing an amusement admission tax:

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[9]Kansas City, Missouri at http://cityclerk.kcmo.org/liveweb/content/content.aspx?id=9; St. Louis, Missouri Ordinance No. 64401; Iowa City, Iowa No. 2-6-1 *et seq.*; Boulder, Colorado Ordinance No. 7416; Minneapolis, Minnesota Ordinance No. 142-10 *et seq.*; Madison, Wisconsin Ordinance No. 3.23 *et seq.*; Milwaukee, Wisconsin Ordinance No. 111-1 *et seq.*; Oak Park, Illinois Ordinance No. 2-10-13; Chapel Hill, North Carolina Ordinance No. 95-4-24; Seattle, Washington Ordinance No. 4.24.005.

[10]City of Cleveland Heights, Ohio Ordinance No. 181.01 *et seq.*

[11]*City of Cleveland Heights, ex rel. Hicks v. City of Cleveland Heights,* 832 N.E.2d 1275 (Ohio, 8th Dist. 2005).

[12]Kan. Const., Art. 12, § 5(b).

[13]Heim, *Home Rule Power for Cities and Counties in Kansas,* 66 J. Kan. Bar Ass'n 26, 29 (1997).

[14]Kan. Const., Art. 12, § 5(c).

[15]269 Kan. 670 (2000).

> "In 1961, the home rule amendment to the Kansas Constitution took effect and empowered cities to determine their local affairs. *The legislature retains power over statewide matters. Hence, home rule power does not authorize cities to act where the state legislature has precluded municipal action by clearly preempting the field with a uniformly applicable enactment.* Generally speaking, where the legislature has not preempted the field with a uniformly applicable enactment, cities may exercise their home rule power by one of two means. Where there is a nonuniform legislative enactment that is in conflict with the action a city wants to take, a charter ordinance may be used to exempt the city from the legislative enactment. Kan. Const. art. 12, § 5(c). *Where there is no legislative enactment in conflict with the local action, an ordinary ordinance will suffice.*"[16]

In analyzing ordinary ordinances, the Kansas appellate courts apply the following standards:

> "A city ordinance should be permitted to stand unless an actual conflict exists between the ordinance and a statute, or unless the legislature has clearly preempted the field so as to preclude municipal action."[17]

> "A test frequently used to determine whether conflict . . . exists is whether the ordinance permits . . . that which the statute forbids or prohibits that which the statute authorizes. . . ."[18]

> "[In] cases involving the legality of an ordinance under home rule authority, 'the ordinance is entitled to a presumption of validity and should not be stricken unless its infringement upon a statute is clear beyond substantial doubt.'"[19]

III. Conflict and Preemption

Applying this analysis to proposed Ordinance No. B, we must decide: (1) whether the ordinance conflicts with a statute; and (2) whether the Legislature has preempted the ordinance by passage of an enactment that applies uniformly to all cities.[20]

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[16] *Id.* at 673. (Emphasis added, internal citation omitted).

[17] *McCarthy v. City of Leawood*, 257 Kan. 566, 569 (1995).

[18] *Home Builders Assn. of Greater Kansas City v. City of Overland Park*, 22 Kan.App.2d 649, 657 (1996), citing *City of Junction City v. Lee*, 216 Kan. 495 (1975).

[19] *Id.* at 22 Kan.App.2d 657-58.

[20] *State of Kansas ex rel. Kline v. Unified Board of Commissioners of the Unified Government of Wyandotte County/Kansas City, Kansas et al.*, 277 Kan. 516, 526 (2004); *Executive Aircraft Consulting Inc. v. City of Newton*, 252 Kan. 421, 424 (1992); *City of Junction City v. Griffin*, 227 Kan. 332, 336 (1980).

There are no statutes addressing domestic partnership registries.[21] While there are uniform statutes governing the establishment and dissolution of the marital relationship,[22] proposed Ordinance No. B does not address marital relationships.

In the absence of statutes in this area, we consider the recent amendment to the Kansas Constitution, Article 15, §16, (hereinafter referred to as the Marriage Amendment) which provides, as follows:

> "(a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.
>
> "(b) *No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.*"[23]

While we could find no Kansas appellate court decisions addressing whether, for home rule purposes, the same conflict and preemption analysis applied to statutes also applies to provisions of the Kansas Constitution, we will assume, without deciding, that the same analysis applies.[24]

A. The Marriage Amendment/Conflict Analysis

In determining whether the Marriage Amendment conflicts with proposed Ordinance No. B or preempts the City of Lawrence from establishing a domestic partnership registry, we must interpret the Amendment in the context of this proposed ordinance. Towards that end, it is helpful to understand the Amendment's provenance.[25]

The impetus for a constitutional amendment codifying the traditional concept of marriage as between a man and a woman arose as a result of appellate court decisions from other

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[21] *But see* 2007 H.B. 2299 ("[n]o city . . . shall enact any local legislation . . . which creates a domestic partner registry. . . .")

[22] K.S.A. 2006 Supp. 23-101 *et seq.* address the requirements of the marriage contract, its solemnization, marriage licenses, records, and the validity of marriages contracted outside of the state. K.S.A. 60-1601 *et seq.* govern divorce, property division, child custody and support.

[23] Emphasis added.

[24] *See* Heim, *Home Rule Power for Cities and Counties in Kansas*, 66 J. Kan. Bar Ass'n 26, 42 (1997) ("[c]ities must comply with other provisions of the Kansas Constitution in their exercise of home rule").

[25] *See* Cook *Kansas's Defense of Marriage Amendment: The Problematic Consequences of a Blanket Nonrecognition Rule on Kansas Law*, 54 U. Kan. L. Rev. 1165 (May, 2006).

jurisdictions that concluded that same-sex partners are entitled to the same legal rights and protections as married couples.[26]

Subsection (a) of the Marriage Amendment mirrors current Kansas law acknowledging marriage as a union between only one man and one woman.[27] The meaning of subsection (b) was the subject of debate during the 2004 and 2005 Kansas legislative sessions.

2004 House Concurrent Resolution No. 5033 (HCR 5033) initially contained only subsection (a), defining marriage as a civil contract between a man and a woman. The House Committee on Federal & State Affairs amended HCR 5033 to include a prototype for the current subsection (b):

> "No relationship other than a marriage between one man and one woman shall be recognized by the state as being entitled to the benefits of marriage."[28]

The House Committee of the Whole further amended the provision to provide:

> "No relationship other than a marriage between one man and one woman shall be recognized by the state as being entitled to the ~~benefits~~ rights, benefits, privileges and incidents of marriage."

Despite the Senate Committee of the Whole's deletion of this provision, it failed to adopt the amended resolution which doomed HCR 5033.[29]

HCR 5033 was resurrected in the 2005 legislative session as Senate Concurrent Resolution 1601(SCR 1601). SCR 1601 was similar to HCR 5033, except that subsection (b) was modified to read as it currently exists today:

> "No relationship, other than a marriage, ~~between one man and one woman~~ shall be recognized by the state as ~~being entitled to the rights, benefits, privileges and~~ entitling the parties to the rights or incidents of marriage."

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[26] *Goodrich v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Ha. 1993). *See also Lawrence v. Texas*, 539 U.S. 558 (2003). *Minutes*, House Committee on Federal & State Affairs, Jan. 20, 2005, Attachment 5; *Minutes*, House Committee on Federal & State Affairs, Jan. 25, 2005, Attachment 4 (Testimony of Law Professor Kris Kobach).

[27] K.S.A. 2006 Supp. 23-101.

[28] *Minutes*, House Commmittee on Federal & State Affairs, February 11, 2004, Attachment 2; *Minutes*, House Committee on Federal & State Affairs, February 17, 2004, Attachment 9.

[29] Journal of the Senate, 1547, 1554 (March 25, 2004).

SCR 1601 passed the Senate with a two-thirds majority. Explaining his affirmative vote, Senator Tim Huelskamp stated that "the purpose and intent of SCR 1601 is to protect and reserve the special status of the institution of marriage in Kansas."[30]

When SCR 1601 reached the House, there was an unsuccessful attempt to delete subsection (b).[31] The measure passed the following day with the required two-thirds majority in spite of the concerns of some members regarding its meaning.[32]

In crafting subsection (b), the Revisor of Statutes presented verbiage from other states that precludes unmarried couples from being accorded the statutory and common law benefits that generally flow from the marital relationship. However, while subsection (b)'s verbiage embraces this concept, it does not mirror any other state's provisions.[33]

A proponent of SCR 1601, Representative Jan Pauls testified that subsection (b) would prohibit the State from: (1) providing marital benefits for non-marital relationships; and (2) from compelling others to treat non-marital relationships as the equivalent of marriage.[34] Thus, as she explained, no employer could be forced to offer insurance benefits to non-marital couples, but private employers could voluntarily offer such benefits.[35] She assured legislators that SCR 1601 "would not remove any rights that any Kansas citizen presently holds."[36]

Professor Kris Kobach, a constitutional law professor at the University of Missouri-Kansas City, testified regarding the meaning of subsection (b):

> "SCR 1601 only applies to rights and incidents of marriage conveyed by 'the state.' It does not limit contractual or legal arrangements between private parties. In other words, private contracts that offer benefits similar to those offered to married couples are in no way prohibited by SCR 1601. For example, an employer could offer health benefits to gay partners of employees without contravening SCR 1601 in any respect. When such a private contract is made, it does not constitute 'recognition by the state.' The state has not acted in any way. *[A] right or incident of marriage is something that is automatically triggered when a marriage exists. It is something that*

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[30] Journal of the Senate, 43 (Jan. 13, 2005).

[31] Journal of the House, 101(Feb. 1, 2005).

[32] Journal of the House, 104-108 (Feb. 2, 2005).

[33] *Minutes*, House Committee on Federal & State Affairs, January 20, 2005, Attachments 1 and 3.

[34] *Minutes*, House Committee on Federal & State Affairs, January 25, 2005, Attachment 1.

[35] *Id. See* Tennessee Attorney General Opinion No. 04-066 (statute recognizing a marriage of one man and one woman as "the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage" does not prevent private employers from voluntarily extending employee benefits to partners of employees in same-sex relationships).

[36] *Minutes*, House Committee on Federal & State Affairs, January 25, 2005, Attachment 1.

> *has been positively identified by statute or court decision.* [SCR] 1601 in no way prohibits a gay couple from executing a will. . . . [In] other words, . . . contractual or private legal arrangements are not 'rights or incidents of marriage,' because they do not come into existence automatically under state law as soon as a marriage exists. [A] living will is not a 'right or incident' of marriage."[37]

Supporters of the amendment agreed that subsection (b) would accord only to marriages those statutory and judicially created rights associated with the marital relationship.[38]

When the electorate voted on the measure in April 2005, the explanatory statement on the ballot acknowledged this intent:

> "The proposed constitutional amendment also would prohibit the state from recognizing any other legal relationship that would entitle the parties in the relationship to the rights or incidents of marriage."[39]

In view of the legislative history of the Marriage Amendment, it appears that the Amendment prohibits the State from recognizing non-marital relationships as being entitled to the legal rights and responsibilities accorded by common law and statute to married couples. However, the Marriage Amendment does not preclude private employers from offering employee benefits to the partners of employees.

As mentioned previously, an ordinance conflicts with a statute if it permits something that is forbidden by the statute.[40] Applying this test, it is our opinion that proposed Ordinance No. B does not conflict with the Marriage Amendment because the ordinance does not permit something forbidden by the Marriage Amendment. The latter prohibits the State from recognizing non-marital relationships as being entitled to the "rights or incidents of marriage." The proposed ordinance, by its terms, "creates no legal rights, other than the right to have the registered domestic partnership included in the City's Domestic Partner Registry."[41] This right of registration is not one of the "rights or incidents of marriage" contemplated by the Marriage Amendment. As this proposed ordinance does not attempt

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[37] *Minutes*, House Committee on Federal & State Affairs, January 25, 2005, Attachment 4 (emphasis added.)

[38] *Minutes*, House Committee on Federal & State Affairs, January 25, 2005, Attachments 1, 3, 4; *Minutes*, House Federal & State Affairs, January 27, 2005, Attachment 1. The federal Government Accounting Office (GAO) determined, in 2004, that there were 1,138 federal statutes involving the rights, responsibilities and privileges that appear to be related to the marital relationship. An example of a judicially created right is the common law doctrine of "necessaries" that obligates each spouse to pay the "necessaries" of the other. *St. Francis Regional Medical Center v. Bowles*, 251 Kan. 334 (1992).

[39] L. 2005, Ch. 211.

[40] *Home Builders Assn. of Greater Kansas City v. City of Overland Park*, 22 Kan.App.2d 649, 657 (1996), citing *City of Junction City v. Lee*, 216 Kan. 495 (1975).

[41] Ordinance No. B, § 10-206.

to imbue non-marital relationships with those statutory and common law rights accorded to the marital relationship, we find no conflict with the Marriage Amendment.

B. The Marriage Amendment/Preemption Analysis

Whether the State, by virtue of the Marriage Amendment, has pre-empted the field to the exclusion of any local legislation depends upon the language, the purpose, and scope of the Marriage Amendment.[42] In *Missouri Pacific Railroad v. Board of Greeley County Comm'rs*,[43] the Court enunciated the State's authority and rationale for preemption:

> "The legislature may reserve exclusive jurisdiction to regulate in a particular area when an intent is clearly manifested by state law to pre-empt a particular field by *uniform* laws made applicable throughout the state.
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> "The rule denying power to a local body when the state has pre-empted the field is a rule of necessity based upon the need to prevent dual regulation which would result in uncertainty and confusion; and *whether the state has pre-empted the field to the exclusion of local legislation depends not only on the language of the statutes, but upon the purpose and scope of the legislative scheme.*"[44]

By utilizing uniform laws, the State is able to preempt cities from acting in a variety of circumstances:

> "The legislature with some frequency has pre-empted home rule by passage of uniform laws that also contain preemptive language. Some uniform laws, however, do not need to contain any pre-emptive language because, by simply prohibiting actions like the levying of certain types of tax or the licensure or regulation of certain activities, they expressly forbid local action in the area."[45]

Clearly, the Marriage Amendment is a uniform law applicable throughout the State and, as such, preempts cities from enacting ordinances that purport to recognize non-marital relationships as being entitled to those statutory and common law rights and responsibilities accorded to the marital relationship. However, as we have indicated

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[42] *State ex rel. Kline v. Board of Comm'rs of Unified Gov't of Wyandotte Co./Kansas City, Kansas*, 277 Kan. 516, 530 (2004), citing *Missouri Pacific Railroad v. Bd. of Greeley County Comm'rs*, 231 Kan. 225, 228 (1982).

[43] 231 Kan. 225, 227-28 (1982).

[44] *Id.* (emphasis added).

[45] Heim, *Home Rule Power for Cities and Counties in Kansas*, 66 J. Kan. Bar Ass'n 26, 35 (1997). For examples of city activities preempted by state law, see Heim, *Home Rule: A Primer*, 74 J. Kan. Bar Ass'n 26, footnote 89 (2005); Heim, *Home Rule Power for Cities and Counties in Kansas*, 66 J. Kan. Bar Ass'n 26, footnote 73 (1997).

previously, proposed Ordinance No. B does not attempt to accomplish this feat. Therefore, in the absence of uniform legislation prohibiting cities from establishing domestic partnership registries, or from legislating in the area of domestic partnerships generally, the Marriage Amendment does not preempt the City of Lawrence from establishing a domestic partnership registry as described in proposed Ordinance No. B.

We note that in at least three other jurisdictions[46] appellate courts have considered the issue of preemption and domestic partnerships.

In *Devlin v. City of Philadelphia,*[47] the City extended its anti-discrimination prohibitions in employment and public accommodations on the basis of marital status to "life partners." The definition of "marital status" was amended to include "life partner." City taxpayers, in a declaratory judgment action, argued that the Commonwealth's laws regulating marriage, including a statute[48] similar to Kansas' Marriage Amendment, preempted the City from creating a new marital status. Finding that the City did not legislate in the area of marriage by attempting to "imbue Life Partners with the myriad of rights and responsibilities that the Commonwealth's domestic relations laws impart on married individuals,"[49] the Pennsylvania Supreme Court found no preemption and upheld the ordinance.

In *Lowe v. Broward County,*[50] the county's attempt to provide county employment benefits to the domestic partners of county employees was challenged on preemption grounds. As in the *Devlin* case, Florida had a similar statute invalidating same-sex marriages as well as "relationships between persons of the same sex which are treated as marriages in any jurisdiction."[51] The Florida appellate court concluded that the county was not preempted because the county's legislation did not create a marriage-like relationship in contravention of the statute:

> "The statute is directed at same sex marriages, with all the rights and obligations of traditional marriages, or their equivalent by any other name. The [Domestic Partnership] Act is not limited to persons of the same sex. The

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[46] *Devlin v. City of Philadelphia*, 862 A.2d 1234 (Pa. 2004); *Heinsma v. City of Vancouver,* 29 P.3d 709 (Wash. 2001); *Lowe v. Broward County,* 766 So.2d 1199 (Fla. 2000). *See also Slattery v. City of New York,* 697 N.Y.S.2d 603 (1999).

[47] 862 A.2d 1234 (Pa. 2004).

[48] 23 Pa. C.S. § 1704 ("[I]t is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state . . . even if valid where entered into, shall be void in this Commonwealth").

[49] 862 A.2d at 1244.

[50] 766 So.2d 1199 (Fl. 2000).

[51] Section 741.212, Florida Statutes (1999).

> Act provides benefits to domestic partners. It does not create that plethora of rights and obligations that accompany a traditional marriage."[52]

Our conclusion is consistent with the rationale of these cases.

IV. "Local affairs and government"/Regulation of marriage

Before we leave the area of home rule, we address the issue of whether a domestic partnership registry exceeds the City's ability to legislate only in the area of its "local affairs and government."[53]

Kansas appellate courts have been reluctant to curtail the ability of a city to legislate by narrowly construing the "local affairs" provision. The seminal treatise on home rule addressing this subject,[54] cited in numerous appellate court decisions,[55] finds the distinction between local and statewide matters not capable of practical application:

> "No ordinance deals with an exclusively local matter and no statute regulates a matter of exclusively state concern. Instead, the interests of the municipality and the state are nearly always concurrent. [Although] the Kansas amendment speaks of empowering cities to determine their "local affairs and government," this phrase should not be rigidly construed as a limit on local initiative. Even if an ordinance has extraterritorial effects that make its impact other than "purely local," the ordinance should stand if not in conflict with a state statute."[56]

In another treatise on home rule,[57] the author concludes that the distinction between local and state affairs is "unnecessary" because the Legislature can trump an attempt by a city to intrude in state matters by enacting a uniform law:

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[52]766 So.2d at 1208. *But see Nat'l Pride At Work v. Governor of Michigan*, 2007 WL 313582 (Mich. App.) (constitutional amendment that "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" precludes local governmental units from extending employment benefits to domestic partners of employees).

[53]Kan. Const., Art. 12, § 5(b).

[54]Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 Kan. L.Rev. 631(1972).

[55]*State ex rel. Kline v. Board of Comm'rs of Unified Gov't of Wyandotte Co./Kansas City, Kansas*, 277 Kan. 516 (2004); *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, 269 Kan. 670 (2000); *State ex rel. Franklin v. City of Topeka*, 266 Kan. 385 (1998); *Missouri Pacific Railroad v. Bd. of Greeley County Comm'rs*, 231 Kan. 225 (1982); *City of Junction City v. Griffin*, 227 Kan. 332 (1980); *State ex rel. Schneider v. City of Kansas City*, 228 Kan. 25 (1980).

[56]Note 54 at p. 662.

[57]Vanlandingham, *Municipal Home Rule in the United States*, 10 William and Mary Law Review, 269 (Winter, 1968).

> "Inasmuch as Kansas cities may perform such functions as are not forbidden by uniform law applicable to all cities, judicial determination of what constitutes local affairs and government and what constitutes state affairs appears to have become unnecessary. The criterion for determining the legality of local action in either local or state affairs is whether the state legislature has already acted by uniform law applicable to every city. If the state has so acted, local action is thereby precluded. [It] seems a paradox that under a provision intended primarily for home rule, unless forbidden by uniform law applicable to all cities, cities may initiate legislation on state matters."[58]

In *City of Junction City v. Griffin,*[59] the Court addressed whether a city could charter out of the Kansas Code of Procedure for Municipal Courts. One of the arguments marshaled by the defendant was that the Code was a matter of statewide concern that should be left undefiled by cities:

> "A strong argument is made that a code of procedure in municipal courts is a matter of statewide concern and should not be left to determination by local government. We are inclined to agree, but the language of the constitutional amendment, which empowers cities to determine 'their local affairs and government,' was never intended as a limitation on the power, so as to restrict it to matters of strictly local concern.
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> "So, even if a legislative enactment by the State addresses a matter which may be considered of statewide concern, a city remains free to take legislative action by charter ordinance concerning the same matter unless the legislative enactment by the State applies uniformly to all cities. [The] legislature may foreclose municipal legislative action only by an enactment of uniform application to all cities."[60]

The only Kansas appellate court decision[61] striking an ordinance on the basis that the city exceeded its ability to address its "local affairs" occurred when the City of Kansas City attempted to require the Kansas Board of Regents to abide by city building codes. The Court limited its holding, which has been distinguished by subsequent decisions,[62] to the facts of the case.[63]

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[58] *Id.* at 302.

[59] 227 Kan. 332 (1980).

[60] *Id.* at 336-37 (internal citation omitted).

[61] *State ex rel. Schneider v. City of Kansas City*, 228 Kan. 25 (1980).

[62] Note 55.

[63] 228 Kan. at 33. ("It would be impossible to draw a line delineating between local affairs and those which encompass an expanded or statewide application which would be applicable to all situations which might arise. [Our] decision . . . is limited to the parties and the factual situation before us.")

We are also mindful of appellate court decisions from other jurisdictions that have upheld local domestic partnership registries against challenges that the regulations exceeded the jurisdiction's ability to govern its local affairs.[64]

In two cases from Illinois and Florida,[65] the City of Chicago and Broward County, Florida established domestic partnership registries similar to the one proposed by the City of Lawrence, except that the registries in those jurisdictions were created for a more ambitious purpose than proposed Ordinance No. B because registration triggered the extension of city and county employment benefits to the partners of city/county employees.

Both regulations were challenged on the basis that they exceeded the home rule authority extended to local governments because the regulations intruded in the arena of domestic relations which, it was argued, is the sole prerogative of the State. In both cases, the appellate courts determined that extending employee benefits did not interfere with the State's ability to create and define the marital relationship:

> "The law of domestic relations is one matter reserved for the state alone. (Citations omitted.) The issue in this case is whether the [Domestic Partnership] Act improperly legislates in the area of domestic relations.
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> "The Act does not legislate within that domestic relations zone that is reserved for the State. The [Domestic Partnership] Act 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. [Domestic] partners under the [Act] . . . do not . . . enjoy the numerous additional rights reserved exclusively to partners in marriage.
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> [For] these reasons, we conclude that the Act does not intrude to a substantial degree into a matter inherently reserved for the state alone."[66]

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[64] *Lowe v. Broward County*, 766 So.2d 1199 (2000); *Crawford v. City of Chicago*, 710 N.E.2d 91 (1999). *See also Tyma v. Montgomery County, Md.*, 801 A.2d 148 (Md. 2002).

[65] *Id.*

[66] 766 So. 2d at 1205-06. The Court considered and disregarded the effect of a Florida statute prohibiting the State's political subdivisions from giving effect to "any public act . . . respecting either a marriage or [a] relationship not recognized" by the State. Relationships not recognized by the State include same sex relationships "treated as marriages in any jurisdiction." § 741.212, Florida Statutes (1999).

While we recognize the State's sole prerogative to regulate the marital relationship,[67] in light of the Kansas appellate courts' reluctance to curtail a city's ability to determine its local affairs[68]and the aforementioned decisions from other jurisdictions, it is our opinion that the City of Lawrence is not intruding upon the State's prerogative by establishing a domestic partnership registry as envisioned by proposed Ordinance No. B.

V. "Local affairs and government"/Extraterritorial Effect

Another facet of the "local affairs" conundrum is that domestic partners, regardless of residence, can avail themselves of the registry. Thus, a couple residing in the City of Topeka or the City of Williamsport, Pennsylvania could, if the other requisites are met, register their partnership in the City of Lawrence under the proposed Ordinance No. B.

As the Home Rule Amendment authorizes cities to regulate only in their "local affairs and government," the proposed ordinance arguably runs afoul of this limitation. Barkley Clark, the author of the previously mentioned treatise on home rule,[69] addressed the propriety of ordinances that have an effect outside of a city's boundaries.

> "Even if an ordinance has extraterritorial effects that make its impact other than 'purely local,' the ordinance should stand if not in conflict with a state statute. [However] the court should . . . be wary of ordinances which may not 'conflict' with statutory law *but which have a substantial impact on interests outside the boundaries of the municipality*. After all, these interests may not be represented in city legislative deliberations, and municipal parochialism should not, in the name of home rule, be allowed to trample over adversaries unable to protect themselves."[70]

In determining whether proposed Ordinance No. B has the kind of extraterritorial effect that would offend the Home Rule Amendment, we review the ordinance promulgated by the City of Cleveland Heights, Ohio which is the model for the City of Lawrence's ordinance.

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[67]Kan. Const., Art. 15, § 16; K.S.A. 2006 Supp. 23-101 *et seq.*; *In re Estate of Gardiner,* 273 Kan. 191, 215 (2002) ("[t]he legislature has declared that the public policy of this state is to recognize only the traditional marriage between 'two parties who are of the opposite sex,' and all other marriages are against public policy and void"); *State v. Walker,* 36 Kan. 297 (1887) (the legislature has full power . . . to prescribe reasonable regulations relating to marriage). *See also Maynard v. Hill,* 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888) ("[m]arriage . . . has always been subject to the control of the legislature").

[68]Kan. Const., Art. 12, § 5(d).

[69]Note 54.

[70]*Id.* at 662, 677 (emphasis added). *See* Attorney General Opinion No. 89-139 (ordinance authorizing city to lease and operate prison outside city boundaries exceeds home rule authority/substantial extraterritorial impact on non-city residents); Attorney General Opinion No. 87-17 (cities have no authority to impose administrative duties on state agency; not a matter of local concern within the meaning of Article 12, Section 5 of the Kansas Constitution); Attorney General Opinion No. 85-152 (city cannot authorize county to hold binding election); Attorney General Opinion No. 82-277(ordinance imposing eligibility requirement for state office holder not a 'local affair').

When a citizen challenged the Cleveland Heights ordinance on the basis that it exceeded the city's home rule authority,[71] the Ohio Court of Appeals considered whether the city's domestic partnership registry, which allowed registration by residents and nonresidents alike, violated Ohio's home rule provision limiting a city's authority to regulate only in the area of "local self-government."[72]

In determining whether municipal legislation related solely to the internal affairs of the municipality, the appellate court reviewed whether the *result* of the legislation had an extraterritorial effect:

> "'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 is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered.
>
> "Here, the registry affects only the municipality itself and has no extraterritorial effects. As the trial court found: 'The city allows residents and nonresidents alike to register. However, the city . . . 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. [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 . . . finds the city of Cleveland Heights Domestic Registry to be an act of self-governance.'"[73]

The Ohio Court of Appeals agreed with the trial court's conclusion and upheld the ordinance creating the registry.

In the absence of guidance from our Kansas appellate courts, we do not know whether a court would be persuaded by the rationale expressed in the *Cleveland Heights* decision. Arguably, the registry proposed in the City of Lawrence's ordinance is simply a list of names of unmarried couples including same-sex couples. Some may register simply to make a

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[71] *City of Cleveland Heights, ex rel. Hicks v. City of Cleveland Heights*, 832 N.E.2d 1275 (Ohio, 8th Dist. 2005).

[72] Ohio Const., Art. XVIII, § 3.

[73] 832 N.E.2d at 1277.

statement that they are mutually committed to each other. Others may register in order to obtain employment benefits bestowed by private organizations that extend such benefits to the partners of their employees. While the registry has an extraterritorial effect in that it gives couples, irrespective of residence, the legal right to register their partnership, no other right is bestowed and no governmental or private organization is required to honor or give credence to it.

On the other hand, depending upon how a Kansas appellate court defines "local affair," such court could conclude that by bestowing a right of registration upon unmarried couples residing outside the City of Lawrence, the ordinance no longer deals with a matter that is local in character but, rather, has an impact that extends beyond the City's boundaries by giving unmarried couples, including same-sex couples, the opportunity to procure governmental acknowledgment of their relationship. In that sense, the City's registry, arguably, operates as a nationwide governmental registry for same-sex couples.
Should the City wish to avert a challenge that the ordinance exceeds the City's ability to govern its local affairs, the City may want to consider imposing a city residency requirement for registration.

VI. Conclusion

We readily acknowledge that the legal propriety of domestic partnership registries is an area unchartered in Kansas law and, consequently, a Kansas appellate court could arrive at a conclusion different from the opinion expressed herein.

We also note that our opinion is confined to the registry contemplated in proposed Ordinance No. B and does not address whether a city can extend health insurance and other employment-related benefits to the domestic partners of its employees.

Given the dearth of guidance by the Kansas appellate courts, we are persuaded by the appellate court decisions from the jurisdictions that have considered and rejected challenges to domestic partnership registries based on home rule considerations of preemption and conflict. Therefore, it is our opinion that proposed Ordinance No. B does not conflict with nor is it preempted by the Marriage Amendment or the statutes establishing the marital relationship. Should the Legislature wish to preclude cities from establishing such registries, it can do so by enacting uniform legislation that is preemptive in nature.[74]

However, in determining whether the proposed ordinance is within the "local affairs" of the City of Lawrence, we recognize that the registry provides, arguably, a governmental nod to same-sex relationships by establishing a right of registration for couples meeting the requirements of the ordinance, regardless of residency. To the extent that the registry is available to nonresidents of the City of Lawrence, it is our opinion that the ordinance

[74] *See* 2007 House Bill 2299.

extends beyond the purview of the City's "local affairs," and, as such, may be found to violate the Home Rule Amendment. Should the City of Lawrence impose a city residency requirement, we believe that the ordinance would pass muster under the Home Rule Amendment.

Sincerely,

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