

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

COURT OF APPEALS NO. A01A1827

SUSAN VATRICE BURNETT BURNS,
Appellant,

v.

DARIAN GREGORY BURNS,
Appellee.

**BRIEF AMICUS CURIAE
OF MARRIAGE LAW PROJECT
IN SUPPORT OF APPELLEE DARIAN BURNS**

Joshua K. Baker
Wendy J. Herdlein
Marriage Law Project
Columbus School of Law
The Catholic University of America
3600 John MacCormack St., NE
Washington, DC 20064

IN ASSOCIATION WITH:

Mark L. Wells (GA Bar #_____)

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE TRIAL COURT'S DECISION PROPERLY RESTS UPON
STATUTORY GROUNDS, AND THERE IS NO NEED TO
GO BEYOND THESE GROUNDS 3

II. NO STATE OR FEDERAL CONSTITUTIONAL ISSUES NEED
TO BE ADDRESSED IN ORDER TO RESOLVE THIS CASE 4

A. THE TRIAL COURT'S ORDER RAISES NO RELEVANT
ISSUES UNDER ARTICLE I, SECTION 1 OF
THE GEORGIA CONSTITUTION 4

1. Appellant Has Freely and Voluntarily
Exercised Her Right to Privacy Without
Infringement by the State of Georgia 5

| | | |
|----|---|----|
| 2. | Appellant Voluntarily Waived Her Privacy Rights to the Extent They Conflict With the Terms of the Visitation Agreement .. | 6 |
| 3. | The Right to Privacy Under the Georgia Constitution Does Not Give Appellant a Right to State Recognition of Her Private Relationship as a Marriage | 8 |
| B. | THE TRIAL COURT'S ORDER RAISES NO RELEVANT ISSUES UNDER THE UNITED STATES CONSTITUTION | 10 |
| | CONCLUSION | 16 |
| | CERTIFICATE OF SERVICE | 17 |

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. CONST. ART. IV, § 1 11
GA. CONST. ART. I, § 1 5

FEDERAL CASES

Bowers v. Hardwick

478 U.S. 186 (1986)..... 12

Boy Scouts of America v. Dale,

530 U.S. 640 (2000)..... 12-13

Lyng v. Northwest Indian Cemetery Protective Ass'n

485 U.S. 439 (1988)..... 4

M.L.B. v. S.L.J.,

519 U.S. 102 (1996)..... 13-14

Shahar v. Bowers,

114 F.3d 1097 (11th Cir. 1997)..... 12

Troxel v. Granville,

530 U.S. 57 (2000)..... 14

STATE CASES

Bazemore et al. v. Savannah Hospital,
171 Ga. 257, 155 S.E. 194 (1930)..... 9

Christensen v. State
266 Ga. 474, 468 S.E.2d 188 (1996)..... 8

Gagnon v. State,
240 Ga. App. 754, 525 S.E.2d 127 (1999)..... 9

Hines v. Columbus Bank & Trust Co.,
137 Ga. App. 268, 223 S.E.2d 468 (1976)..... 9

King v. State,
272 Ga. 788, 535 S.E.2d 492 (2000)..... 9

Mauk v. State,
242 Ga. App. 191, 529 S.E.2d 18 (2000)..... 9

Pavesich v. New England Life Ins. Co.,
122 Ga. 190, 50 S.E. 68 (1905)..... 6, 8-9

Powell v. State,
270 Ga. 327, 510 S.E.2d 18 (1998)..... 3, 5-9

SECONDARY SOURCES

Patrick J. Borchers, Baker v. General Motors: Implications
for Interjurisdictional Recognition of Non-Traditional
Marriages, 32 Creighton L. Rev. 147 (1998)..... 11

David Orgon Coolidge, The Hawaii Marriage Amendment:
Its Origins, Meaning and Fate,
22 U. Haw. L. Rev. 1 (forthcoming 2001)..... 1

David Orgon Coolidge & William C. Duncan,
Definition or Discrimination? State Marriage Recognition
Statutes in the "Same-Sex Marriage" Debate,
32 Creighton L. Rev. 3 (1998)..... 1

David Orgon Coolidge & William C. Duncan, Beyond Baker:
The Case for a Vermont Marriage Amendment,
25 Vt. L. Rev. 61 (2000)..... 1

INTEREST OF AMICUS CURIAE

Amicus Curiae Marriage Law Project has been involved since 1994 in the effort to reaffirm marriage as the union of one man and one woman. Amicus has drafted briefs in related cases in Hawaii, Vermont, and Alaska. Amicus has also done extensive writing on the significance of state marriage recognition acts and on constitutional challenges to existing legal distinctions between homosexual and opposite-sex couples.¹ This brief draws on Amicus' knowledge in the hope of assisting the Court in its deliberations.

¹ See David Orgon Coolidge & William C. Duncan, Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate, 32 Creighton L. Rev. 3 (1998); David Orgon Coolidge and William C. Duncan, Beyond Baker: The Case for a Vermont Marriage Amendment, 25 Vt. L. Rev. 61 (2000); and David Orgon Coolidge, The Hawaii Marriage Amendment: Its Origins, Meaning and Fate, 22 U. Haw. L. Rev. 1 (forthcoming 2001).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus adopts Appellee's Statement of Facts and Procedural History.

SUMMARY OF ARGUMENT

Susan Burns entered voluntarily into a consent decree that gives equal visitation rights and duties to her and her ex-husband.

The trial court properly rejected her claim that because she has since obtained a civil union in Vermont she is entitled to escape the consequence of her agreement. The court wisely made this decision based upon statutes, refusing to engage in unnecessary constitutional analysis.

By contracting a Vermont civil union, she freely exercised her rights as a private individual and as a parent. Appellants' constitutional claims to the contrary are unavailing. Because Appellant's Vermont civil union is a private act with no State or Federal constitutional relevance, this Court should affirm the decision of the trial court.

ARGUMENT

This is a case about whether Georgia is required to treat a Vermont civil union as a "marriage." The Court should decide this question on statutory grounds. Although it is not necessary, the Court can also hold that the case implicates no State or Federal constitutional issues.

I.

THE TRIAL COURT'S DECISION PROPERLY RESTS UPON STATUTORY GROUNDS, AND THERE IS NO NEED TO GO BEYOND THESE GROUNDS.

The Court can decide this case based on existing statutes, as the trial court did. (R. 37-38). Appellee has supplied additional analysis to confirm the trial court's decision on both State and Federal statutory grounds. See Appellee's Brief 9-17 (on Georgia public policy concerning marriage) and 17-23 (on the Federal Defense of Marriage Act).

Furthermore, where an issue can be resolved without addressing constitutional issues, it is appropriate for a court to refrain from deciding those questions. Powell v. State, 270 Ga. 327, 327-28, 510 S.E.2d 18, 20 (1998)

(referring to "the well-established principle that this Court will not decide a constitutional question if the appeal can be decided upon other grounds"); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.")

II.

NO STATE OR FEDERAL CONSTITUTIONAL ISSUES NEED BE ADDRESSED IN ORDER TO RESOLVE THIS CASE.

While the Court need not address constitutional issues to resolve this case, it may wish to address them. If it does, it should hold that the question of whether the trial court is required to treat a civil union as a marriage is not a State or Federal constitutional question.

A. THE TRIAL COURT'S ORDER RAISES NO RELEVANT ISSUES UNDER ARTICLE 1, SECTION 1 OF THE GEORGIA CONSTITUTION.

Appellant attempts to constitutionalize the Trial Court's decision by arguing that the decision violates her "right to privacy" under the Georgia Constitution. Appellant's Brief, 9-14; Ga. Const., art. I, § 1, para. 1. However, her right to privacy does not entitle her to a court decision holding that a Vermont civil union is a Georgia marriage.

1. Appellant Has Freely and Voluntarily Exercised Her Right to Privacy Without Infringement by the State of Georgia

Appellant properly argues that the Georgia Constitution protects her right to make "personal choices in family matters." Appellant's Brief at 14 (citing to Powell v. State, 270 Ga. 327, 330, 510 S.E.2d 18, 22 (1998)).

But Appellant has already made these choices without interference from the State of Georgia. She voluntarily entered a consent decree that included equal conditions. (R. at 14-16). As long as she abided with these conditions, she was free to visit with her children. She voluntarily went to Vermont to obtain a civil union license. (R. at 23-24). She voluntarily chose to defy her consent decree, and

then voluntarily attempted to justify it by arguing that a civil union is a marriage. (R. at 10-11, 31).

The Trial Court held that Appellant's legal argument about a civil union was incorrect. (R. at 35-39). It also generously held that Appellant's defiance of the consent decree would be prospective, rather than retroactive. (R. at 35). These are questions that arose because of Appellant's own free choice to exercise her rights, and she now seeks to back out of those choices. The fact that the Court disagreed with her arguments does not somehow violate her freely-exercised constitutional rights.

2. Appellant Voluntarily Waived Her Privacy Rights to the Extent They Conflict With the Terms of the Visitation Agreement.

Moreover, Appellant has arguably waived her right to privacy because of acts she has freely chosen. As with every other right that rests with the individual, the right of privacy may be waived. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 199, 50 S.E. 68, 72 (1905).

This right of waiver was more recently recognized as a limitation on the right to privacy in Powell v. State, 270

Ga. 327, 335; 510 S.E.2d 18, 26 (1998). "While Georgia citizens' right to privacy is far-reaching, that is not to say that the individual's right to privacy is without limitation. The Pavesich court recognized that the right could be waived by the individual," Powell, 270 Ga. at 331, 510 S.E.2d at 23.

Appellant moved for and was granted a visitation agreement modification on September 4, 1998. As part of this agreement, both Appellant and Appellee agreed that there would be "no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom party is not related within the second degree." (R. 15, 32, 35-36).

Appellant asserts that she has a right to privacy as to her private, adult sexual activity with Debra Jean Freer. Even assuming that such a right does exist in some situations, Appellant expressly waived that right within the context of the consent decree. In giving her consent to the visitation agreement, Appellant waived her right of

privacy insofar as is necessary to apply the terms of the agreement.

3. The Right to Privacy Under the Georgia Constitution Does Not Give Appellant a Right to State Recognition of Her Private Relationship as a Marriage.

Even if Appellant has not waived her right to privacy, it is incongruous to argue that based on that right, Appellant has a right to force Georgia to give her a marriage based on her private relationship and choices.

The right of privacy has been found to limit government prohibition of private, consensual, non-commercial sexual activity. Powell v. State, 270 Ga. 327, 335; 510 S.E.2d 18, 26 (1998); see also Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Christensen v. State, 266 Ga. 474, 468 S.E.2d 188 (1996). As a shield against governmental intrusion into private affairs, however, the right of privacy cannot be construed to require affirmative government recognition of any private relationships. Neither the Powell decision nor any other ruling on Georgia's right to privacy lend any support to the proposition that Georgia must recognize same-sex

relationships or sexual activity as a "legal marriage." See Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998); Mauk v. State, 242 Ga. App. 191, 529 S.E.2d 197 (2000); Gagnon v. State, 240 Ga. App. 754, 525 S.E.2d 127 (1999).

Georgia courts have clearly indicated that the right to privacy protects only "private matter[s]," Powell, 270 Ga. at 332, 510 S.E.2d at 24, such as personal medical information, use of an individual's identity, and protection from intrusion upon seclusion and public disclosure of private facts. King v. State, 272 Ga. 788, 535 S.E.2d 492 (2000); Hines v. Columbus Bank & Trust Co., 137 Ga. App. 268, 223 S.E.2d 468 (1976); Bazemore et al. v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).

Similarly, the right of privacy is not without limitation, and must be limited to avoid infringement upon the rights of interested third parties. Pavesich, 122 Ga. at 201, 50 S.E. at 72-73 (exercise of right to privacy must be limited to respect "the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern").

Here, Appellee is properly interested in the activity Appellant claims to be purely private, insofar as that activity relates to his children and to the visitation agreement to which he is a party. Appellant's asserted "right to privacy" in the present situation cannot be used to redefine the language of the visitation agreement or void Appellee's right to enforcement of the September 4, 1998 visitation agreement.

Appellant has exercised her right to privacy in making personal family choices as reflected in the visitation agreement. By entering the consent decree, Appellant voluntarily and expressly waived her privacy rights to the extent they conflict with the visitation agreement. Appellant's unfringed exercise of her privacy rights does not give Appellant the right to have her actions and personal relationships legally recognized as marriage by the state of Georgia.

**B. THE TRIAL COURT'S ORDER RAISES NO RELEVANT ISSUES
UNDER THE UNITED STATES CONSTITUTION.**

Appellant contends that the Court "need not review any federal law to rule in her favor." Appellant's Brief at 9. Amicus agrees, but for different reasons.

First, Georgia has no affirmative duty to recognize either a same-sex "marriage" or a civil union under the Full Faith and Credit Clause. U.S. Const., Art IV, § 1. As Professor Patrick Borchers has noted, "courts are permitted to apply their own law and refuse the application of a sister-state's law in almost all cases."²

Second, Georgia has no affirmative duty to officially recognize a private relationship under the Due Process Clause of the Fourteenth Amendment. U.S. Const., amend.

²Patrick J. Borchers, Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages 32 Creighton L. Rev. 147, 164 (1998). The only exceptions involve some judgments from other states, and instances where the court has no contact with the underlying transaction. The Vermont law is not a judgment, and the court was the setting for the original transaction, so in this case neither exception is relevant.

XIV. Appellant concedes that the Federal standard is lower than Georgia's in this regard. Appellant's Brief at 8, 10. Therefore, if the Georgia Constitution does not require such recognition, as amicus argues supra at 7-10, the United States Constitution does not require it either. Federal jurisprudence is clear on this point. See Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that the Due Process Guarantee does not extend constitutional protection to consensual same-sex relationships), and Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (finding no constitutional violation in the decision of a state agency to revoke a job offer based on an applicant's participation in a private same-sex "marriage" ceremony).

These points were clearly illustrated again last year in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). In Dale, the New Jersey Supreme Court had held that a Boy Scout policy excluding homosexual persons from leadership positions in the Scouts violated a New Jersey anti-discrimination law. Id. at 643. The United States Supreme Court reversed the New Jersey court's decision, holding that it violated the Boy Scouts' right of free association.

Id. at 643-44. The Court did not suggest, however, that the State is now required to endorse the Boy Scouts' activities which exercise these rights. This would be absurd on its face.

Yet that is essentially the argument Appellant makes in this case. Contrary to Appellant's claim, her right to free association does not require the state to endorse her relationship and treat her as married.

Third, the fact that Appellant is a parent does not require Georgia to treat Appellant as "married." Parental rights exist with or without marriage under the Due Process Clause of the Fourteenth Amendment, as Appellant rightly notes. Appellant's Brief at 9, citing M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996).³ Indeed, the Supreme Court strongly

³ M.L.B. v. S.L.J. involved a mother who had been adjudicated unfit as a parent and was precluded from appealing the case for failure to pay the fees necessary for a transcript. 519 U.S. at 106. The Supreme Court reversed under the Due Process Clause, concluding that the mother's right to participate in the upbringing of her

reaffirmed these rights last year in Troxel v. Granville, 530 U.S. 57 (2000).⁴

children was a fundamental right, id. at 116, and that she was entitled to appeal the deprivation of that right despite her inability to pay usual costs. Id. at 128. Though not cited by any Georgia court, M.L.B. has been cited in 116 state and federal cases since being handed down in 1996. Many of these cases have relied upon M.L.B. for the proposition that decisions regarding "marriage, family life, and the upbringing of children" are fundamental rights.

⁴ Appellant neglected to cite this case. In Troxel, the United States Supreme Court struck down a Washington statute which gave the courts jurisdiction to award visitation to any third person upon its own determination of the best interests of the child, without any deference given to the wishes of the child's parents. The Court held that application of the statute to award visitation privileges to a third party over and above the mother's wishes was an infringement upon her fundamental right as a

Both of these cases, however, involved state statutes that limited or cut off a mother's right to raise her children. There is no such statute at issue here. Rather, Ms. Burns voluntarily consented to an agreement in which both parties waived their right to cohabit with an unmarried partner during visitation with their children.

The visitation agreement entered in 1998 merely forbids certain activities while visiting with the children, and it applies equally to Appellant and Appellee. These conditions include that while the children are visiting, neither may participate in any illegal activity; neither may use any illegal substance; and neither may cohabit with an unrelated adult to whom he or she is not married. (R. 13)

Both Appellant and Appellee agreed to these conditions. If they adhere to them, each can participate in their children's upbringing. If they do not, the fault is not due to the State's interference with their rights.

parent "to direct the education and upbringing of [her] children." 530 U.S. at 66-67.

In summary, Appellant's case is not about constitutional issues. Neither the Georgia nor Federal Constitution requires that she be treated as "married."

CONCLUSION

For the reasons stated above, amicus Marriage Law Project respectfully requests this court to affirm the decision of the Floyd County Superior Court.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent this _____ day of August, 2001, to counsel for both parties and amici at the addresses listed below:

Adrian F. Lanser, III
109 East Church Street
Cartersville, GA 30120

Mathew D. Staver
Erik W. Stanley
Joel L. Oster
Liberty Counsel
210 East Palmetto Avenue
Longwood, FL 32750

Douglas D. Slade
Attorney at Law
107 E. 5th Avenue
Rome, GA 30162

David Orgon Coolidge
William C. Duncan
Marriage Law Project
Columbus School of Law
3600 John MacCormack, NE
Washington, DC 20064

Joshua K. Baker
Wendy J. Herdlein
Marriage Law Project
Columbus School of Law
3600 John MacCormack, NE

Terry L. Lloyd
McGarity & Lloyd
175 Gwinnett Dr., #377
Lawrenceville, GA 30045

Matthew A Coles
Kenneth Y. Choe
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
212.549.2627
212.549.2650 (fax)

Gerald R. Weber
Robert L. Tsai
American Civil Liberties
Union Foundation of Georgia
142 Mitchell Street, S.W.,
Suite 301
Atlanta, GA 30303
404.523.6201
404.577.0181 (fax)

Washington, DC 20064

Mark L. Wells
GA Bar # _____

