

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	SUPREME CT. CASE NO. 06-0151
)	
Plaintiff/Appellee,)	On Appeal from the Warren
)	County Court of Appeals,
vs.)	Twelfth Appellate District
)	
MICHAEL CARSWELL,)	
)	Court of Appeals
Defendant/Appellant.)	Case No. CA 2005-04-047

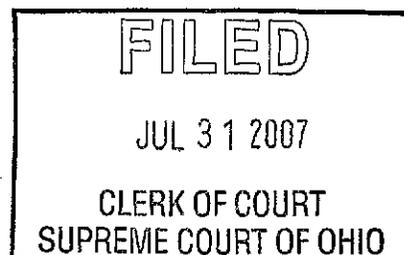
MOTION FOR RECONSIDERATION OF
APPELLANT MICHAEL CARSWELL

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IN THE OHIO SUPREME COURT

STATE OF OHIO,)	CASE NO. CA 2006-0151
)	
Appellee,)	
)	
vs.)	<u>APPELLANT'S MOTION</u>
)	<u>FOR RECONSIDERATION</u>
MICHAEL CARSWELL,)	
)	
Appellant.)	

Now comes the Appellant, Michael Carswell, by and through counsel, pursuant to S. Ct. Prac. R. XI, §2(A), and moves this Court to reconsider it's July 25, 2007, Decision made in this case (2007-Ohio-3723). As the Court is aware, the primary test applied to motions for reconsideration is whether the motion calls to the Court's attention an obvious error in its decision or raises an issue for consideration that was either *not considered at all*, or *not fully considered*, when it should have been. See Mathews v. Mathews (1981), 5 Ohio App.3d 140, 143. Such is the case here, in the following respects:

1. Presumption of Validity of Statute that pre-exists voter-adopted Constitutional Amendment.

This Court finds that the Domestic Violence Statute adheres to a presumption of validity over a subsequently enacted Constitutional Amendment, passed by the voters as opposed to the General Assembly. Decision, 2007-Ohio-3723, ¶ 6. There was no applicable constitutional provision when the Domestic Violence Acts were written and passed and therefore the principles supporting any presumption of consistency do not exist. See United States v. Morrison (2000), 529 U.S. 598, 607; United States v. Harris (1883), 106 U.S. 629, 636. The *inapplicability* of those presumptions was adopted and applied in this same context in State v. Ward (2006), 166 Ohio App.3d 188, 2006-Ohio-1407, ¶ 8-18. Cases -- to the extent addressing statutes that

preexist constitutional provisions, the context of this case -- do not change this standard. For example, this Court in State ex rel. Roof v. Board of Commissioners (1974), 39 Ohio St.2d 130, 135-144, did not speak of any deference to the legislature, but primarily and initially construes the Constitution, and *then* considers how the statute applies. See also, State v. Cameron (1914), 89 Ohio St. 214, 219 ("If the statute exceeded the power conferred by the constitution, then to the degree of the excess clearly that must fall by reason of repugnance."). It makes sense that the Court should not presume that a legislature repealed its own acts when the legislature itself doesn't say so. On the other hand, one could easily presume that the primary, if not only reason for the public to take a matter into its own hands by constitutional amendment is to do just that: override the legislature.

Nonetheless, the general principles of reliance on the intent of a legislature in passing a statute are completely inapplicable, as the constitutional provision was not even in effect at the time the statute was passed. What should be given a strong presumption of validity is the pronouncement of the general *public*, expressed through the Ohio Constitution. These applicable authorities do not appear to be given full consideration by the Court and therefore the Decision should be reconsidered in at least that regard.

2. The Statute and the Constitutional Amendment do conflict, if words are not added to or taken away from either.

The Court construes the Statute -- which recognizes a legal status for family and household members only if they "cohabit" -- not in conflict with the Constitutional Amendment. This construction depends upon reconciliation of, or allows, the following direct conflicts and inconsistencies the Court apparently did not consider -- unless unwritten words are *added to* or *taken from* one or the other:

--- That the Statute is not unconstitutional because it does not "create" a relationship like a marriage or a so-called civil union (§ 35); but the Constitution nowhere says that. Although the Domestic Violence Statute creates the relationship of "family or household member," that has no legal significance other than the domestic violence laws, the Constitution prohibits mere *recognition* without "creation" of anything, by merely affording to such non-marital relationships the benefits or responsibilities of marriage. The Domestic Violence law "recognizes" the relationship, by affording it a legal status, regardless of how or who creates the relationship. The Domestic Violence Statute *itself* at least recognizes such a benefit and a responsibility, being the same benefit (protection) and responsibility (criminal liability) as married people have from it -- IF their cohabitation relationship (their "quasi-marriage") "approximates" a real marriage. It is not courts or individuals but the Domestic Violence Statute itself which at least "recognizes" a "legal status" by defining persons as "family or household members" according to that unmarried couple's living arrangements similar to -- approximating -- that of a married couple.

--- That the Domestic Violence Statute is not unconstitutional because it does not "create" a legal status which is the equivalent of, or affords "all" the attributes of a marriage (§ 13). The Constitution nowhere includes such a requirement. The Constitution uses the verb "approximate," not "equate," and "approximate" is by definition not "all." The distinction does not depend upon researching the history of the English language or consultation with linguistics and dictionaries to understand. The Constitution nowhere includes a requirement that "all" of marriage-characteristics be recognized, but only prohibits the *approximation* of *either* (the meaning of "or" one presumes) the *design* of marriage, OR the *qualities* of marriage, OR the *significance* of marriage, OR the *effect* of marriage. Nowhere is a law prohibited only if it

creates something exactly and fully equivalent to every aspect of marriage, but if it recognizes something that approximates at least one of those attributes of it.

What cannot be avoided is that the Domestic Violence Law creates the status of "family or household member," by recognizing anyone's relationship, if it approximates a marriage, by affording it at least one benefit, quality, effect or significance of marriage: the protection of the domestic violence law.

Why does the Amendment use "approximate" rather than "duplicate," or "exact," or "identical"? Why did it not specify "all" attributes of marriage, instead of only an approximation of one, is the prohibited recognition? Because every marriage is unique. Some married people don't reside together; do not share finances in the same way as others; do not share parental responsibilities the same as others; may have different religious backgrounds; may not have the same sexual relationships; etc. They are all still married, and have the legal rights and responsibilities *because* they have made the legal commitment and taken that final step. Because no marriage is identical to any other, there could be no "equivalent" of marriage. No marriage is even the equivalent of any other marriage. The Courts have recognized this uniqueness by not requiring "every" facet possible in a marriage to be present before finding someone is cohabiting, was married by common law, or is "living as a spouse." Just as 3.5 is approximately 4, and something that looks like a duck at least approximates a duck, a couple who are "living as a spouse," and not necessarily "living exactly as all potential spouses might," is that prohibited approximation of a true marriage.

Imagine if the legislature would, some other right or one statute at a time, begin affording rights of marriage to unmarried persons. The Decision in this case will lend substantial support for the legality of doing so. Would that be acceptable, until there was nothing left, and only then

would it be unconstitutional? What if the General Assembly were to take any other of the myriad qualities, benefits, effects, or significances of marriage (such as inheritance, name changes, insurance, etc.), or the numerous other effects of marriage cited¹, and individually, one statute at a time, include persons "living as a spouse" in their parameters? If a non-spouse "living as a spouse" were suddenly afforded the right to elect against a will; or to file for legal separation or spousal support; or to file a joint tax return; or any other, would none of that be unconstitutional? The unintended consequence of this Decision will support doing so.

This construction of the Amendment, and the Statute, requires the Court to disregard its own pronouncements of construction, that of not reading "into the statute language that does not exist." State v. Hairston, 101 Ohio St.3d 308, 311, 2004-Ohio-969, ¶ 22, quoting Middleburg Hts. v. Ohio Bd. of Building Standards (1992), 65 Ohio St.3d 510, 514. The result requires this Court to ignore the plain words of the second sentence of the Amendment and essentially write it out of existence, or write at least one word into it that is not there, "all;" and requires this Court to construe the second sentence as doing nothing but repeat the first, and to simply reiterate another preexisting statute,² a useless act indeed. This Court has of late given great and deserved import to the provisions of the Ohio Constitution, in protecting Ohioans in their property, privileges, and privacy, and this case should be another instance where the Constitution of Ohio is *given meaning*, not stripped of it. The precedent set by doing so here -- rewriting the language of the Amendment -- is worse, does more damage, than the result of recognizing the Amendment means what it says and requiring the General Assembly to fix it, not the Court, as unpleasant as that might seem.

¹ See Brief of ACLU p. 7; Cuyahoga County Prosecuting Attorney p. 13; Lambda Legal Defense p. 4-5, 11; and Brief of Action Ohio Coalition, p. 15.

² H.B. 272, the "Defense of Marriage Act," eff. Feb. 6, 2004, legislatively nullifying the concept of "gay marriage" in Ohio. R.C. 3101.01(C).

3. The purpose of the Amendment was also not to allow unmarried persons to be treated like married people (§ 15).

As one State-supporting *amici* agreed, "the construction of the Amendment is a duty of the courts, not the proponents," and the "remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," and the "comments of opponents carry no weight." OPAA Brief p. 24 (citations omitted). Pre-election statements do not support the meanings that the State and its supporting *amici* suggested, and that this Court has now adopted. For example, the proponent comments in the *Official Ballot Board* guide specifically stated that the Amendment would not interfere with government benefits already afforded to non-marital relationships, but "only so long as the government does not grant those benefits to such persons for the reason that the relationship is one that seeks to imitate marriage," and it is suggested/conceded by at least one *amicus* that the second sentence of the Amendment was intended "to prohibit *official* recognition of a relationship specifically on the grounds that the relationship seeks to imitate marriage." See OPAA Brief p. 25, 26 (emphasis in original). Giving statutory (how much more "official" can it get than that?) recognition as a victim and offender of a crime and giving entitlement to a special protection order and special bond protections against an offender "specifically" but merely because one is "living as a spouse," but not as a real spouse -- imitating one -- is exactly that -- exactly what the Official Ballot Guide said would no longer be permitted if the voters approved the Amendment.

Unmarried persons of both sexes, if their relationship approximates a marriage, now have retained the first of the challenged benefits of marriage, which they were at risk of losing by the action of Ohio voters.

CONCLUSION

It is suggested that the Court did not fully consider these implications in its Decision. It is therefore requested that the Court reconsider its Decision in these respects, vacate its Decision, and grant the Appellant's requested relief.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Rachel Hutzel/Josh Engel, Warren County Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036, via ordinary U.S. Mail this 27th day of July 2007.



Thomas G. Eagle (#0034492)