

[Cite as *State v. Douglas*, 2006-Ohio-2343.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 86567 & 86568

STATE OF OHIO,	:	
	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	AND
v.	:	
	:	OPINION
CHARLES DOUGLAS,	:	
	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION:	<u>MAY 11, 2006</u>
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CHARACTER OF PROCEEDING:	Criminal Appeal from Common Pleas Court, Case Nos. 465702 & 463822.
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JUDGMENT:	REVERSED AND REMANDED; CONFLICT CERTIFIED.
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DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellant:	William D. Mason Cuyahoga County Prosecutor Matthew T. Norman Assistant County Prosecutor Justice Center, 8 th Floor 1200 Ontario Street Cleveland, OH 44113
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For Defendant-Appellee:	Robert A. Dixon The Brownhoist Building 4403 St. Clair Avenue Cleveland, OH 44103
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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals the judgment of the trial court granting, in part, defendant-appellee Charles Douglas' motion to dismiss. For the reasons that follow, we reverse the judgment of the trial court.

{¶ 2} On May 13, 2005, appellee was indicted by the Cuyahoga County Grand Jury on one count of domestic violence. The indictment alleged that appellee caused or attempted to cause physical harm to the alleged victim, "a family or household member." Appellee and the alleged victim of the offense were not married, but allegedly cohabited. Appellee filed a motion to dismiss, contending that R.C. 2919.25, the domestic violence statute, was unconstitutional. The trial court agreed and dismissed the domestic violence count, but amended the indictment to an assault charge. The State now appeals.

{¶ 3} Appellee's motion to dismiss was based upon the November 2004 approval of the Ohio constitutional amendment known as Issue 1. In particular, Issue 1 amended the Ohio Constitution by defining marriage as follows:

{¶ 4} "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." Section 11, Article XV, Ohio Constitution.

{¶ 5} In a similar case where a defendant was indicted on a domestic violence charge against an alleged victim to whom he was not married, the same trial judge who presided over this case dismissed the charge as being unconstitutional in light of the passage of Issue 1. The state appealed and during the pendency of the within appeal this court ruled in that case, finding that "Ohio's domestic violence statute is neither incompatible with, nor unconstitutional in light of, Issue 1." *State v. Burk*, Cuyahoga App. No. 86162, 2005-Ohio-6727, ¶4. The State raises the same three assignments of error in this case as it did in *Burk*.

{¶ 6} Thus, for the reasons explained in this court's opinion in *Burk*, we hold that Ohio's domestic violence statute is constitutional and coexists in harmony with Section 11, Article XV, of the Ohio Constitution. This court has further noted, subsequent to *Burk*, that "there is unanimous agreement among the fifth, seventh, ninth, and twelfth appellate districts, which have been asked to address this issue, that Article XV, Section 11 of the Ohio Constitution does not render R.C. 2919.25 unconstitutional. See, e.g., *State v. Newell*, Stark App. No. 2004CA00264, 2005-Ohio-2848, ¶43; *State v. Rexroad*, Columbiana App. Nos. 05 CO 36, 05 CO 52, 2005-Ohio-6790, ¶35; *State v. Nixon*, Summit App. No. 22667, 2006-Ohio-72, ¶¶13-16; *State v. Carswell*, Warren App. No.

CA2005-04-047, 2005-Ohio-6547, ¶¶20-21." *Cleveland v. Voies*, Cuyahoga App. No. 86317, 2006-Ohio-815, at ¶1.

{¶7} We note, however, that recently the Second Appellate District, in *State v. Ward*, Greene App. No. 2005-CA-75, 2006-Ohio-1407, reached the opposite conclusion of this district and the fifth, seventh, ninth, and twelfth appellate districts. Based upon the foregoing conflict, we, sua sponte, certify the following question for review by the Supreme Court of Ohio:

{¶8} "Whether R.C. 2919.25, Ohio's domestic violence statute, is unconstitutional in light of the November 2004 amendment to Section 11, Article XV, of the Ohio Constitution."

{¶9} Accordingly, the trial court's judgment granting appellee's motion to dismiss is reversed, and the conflict is certified.

This cause is reversed and remanded, consistent with the opinion herein, and the conflict is certified to the Supreme Court of Ohio.

It is, therefore, ordered that appellant recover from appellee costs herein.

It is ordered that a special mandate be sent to the court of common pleas 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.

CHRISTINE T. McMONAGLE
JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURS.

DIANE KARPINSKI, J., DISSENTS (SEE DISSENTING OPINION).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86567

STATE OF OHIO	:	
	:	
	:	
Plaintiff-appellant	:	DISSENTING
	:	
v.	:	
	:	OPINION
CHARLES DOUGLAS	:	
	:	
	:	
Defendant-appellee	:	

DATE: MAY 11, 2006

KARPINSKI, J., DISSENTING:

{¶ 10} I dissent from the majority's conclusion that Ohio's domestic violence statute, R.C. 2919.25, does not violate the Ohio Constitution, Art. XV, § 11, referred to as the "Defense of Marriage" amendment (the "amendment").

{¶ 11} The majority, in abbreviated fashion, reaches its conclusion that R.C. 2919.25 is constitutional by relying on the authority of *State v. Burk*, Cuyahoga App. No. 86162, 2005-Ohio-6727. I believe, however, that the analysis of *Burk* is flawed. I, therefore, disagree with the conclusion that *Burk* reached.

{¶ 12} In determining whether R.C. 2919.25 conflicts with the amendment, *Burk* posits that

"an enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."

Burk, ¶16, citing *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, ¶34, 804 N.E.2d 19.

{¶ 13} While I agree with a presumption of statutory constitutionality, I do not agree that in determining whether the statute and the amendment conflict, the next step is "to give a reasonable construction *** 'so that both may stand.'" *Burk*, ¶17-¶18, citing *State ex rel. Smead v. Union Twp.* (1858), 8 Ohio St. 394, 399.¹ *Burk* and the majority in the case at bar apply the wrong rule of construction.

{¶ 14} The Ohio Supreme Court has provided the proper method of determining whether a state statute conflicts with a state constitutional provision:

It is not the province of a court to write constitutions or to give to the language used such forced construction as would warp the meaning to coincide with the court's notion of what should have been written therein. On the contrary, the language used must be given its usual and ordinary meaning.

¹For a very scholarly critique of the standard of review used in *Burk* and purportedly applied in *Smead*, supra, see Judge Fain's analysis in *State v. Ward*, Green App. No. 2005-CA-75, 2006-Ohio-1407. Also, see, the similarly rigorous analysis originally provided in the common pleas court opinion by Judge Friedman in *State v. Burk* (Mar. 23, 2005) Cuyahoga Common Pleas No. CR-462510.

In the case of *Slingluff v. Weaver*, 66 Ohio St. 621, it was held by this court, in the second paragraph of the syllabus, that:

"The intent of the law-makers is to be sought first of all in the **language** employed, and if the words **be free from ambiguity and doubt**, and express plainly, clearly and distinctly, the sense of the law-making body, **there is no occasion to resort to other means of interpretation**. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

This applies with equal force to the construction of a constitutional provision. If the result reached by the observance of this first and most important canon of construction falls short of the purpose and intent of the electors, the remedy is by amendment. (Emphasis added.)

Cleveland Tel. Co. v. Cleveland (1918), 98 Ohio St. 358, 368-369, 121 N.E. 701.

{¶ 15} In the case at bar, the only term in the domestic violence statute this court is concerned with is "cohabiting."² Though the term is not defined in the statute, it has been defined by the Ohio Supreme Court as follows:

*** the essential elements of "cohabitation" are (1) sharing of familial or financial responsibilities and (2) consortium. R.C. 2919.25(E)(2) and related statutes.

²Common law marriages were abolished in Ohio in 1991.

Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. These factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact.

State v. Williams, 79 Ohio St.3d 459, 465, 1997-Ohio-79, 683 N.E.2d 1126. Under *Williams*, "domestic violence arises out of the nature of the relationship itself, rather than the exact living circumstances of the victim and perpetrator." *Id.*, 1129.

{¶ 16} *Williams* underscores the purpose of most domestic violence statutes: to acknowledge that an assault on a family or household member is more serious than an assault on a stranger. By enacting domestic violence statutes, legislative bodies intend to protect persons who are in a certain type of "relationship" with one another rather than persons who are simply strangers.

{¶ 17} In prosecuting an offense under the statute, the state must prove the defendant caused or attempted to cause "physical harm to a family or household member." The statute defines "family or household member" as someone who is residing or has resided with

the defendant and who is "[a] spouse, a person living as a spouse, or a former spouse of the offender." R.C. 2919.25(F)(1)(a)(i)-(iii). At (F)(2), the statute further defines "person living as a spouse" as a person "who otherwise is cohabitating or has cohabitated with the offender within 5 years prior to the date of the alleged commission of the act in question."

{¶ 18} On this point, the language of the statute is unambiguous. The statute expressly protects people living together *as if* they were spouses, that is, *as if* they were legally married.

I believe the statute's language "living as a spouse" is clear. Moreover, the Ohio Supreme Court in *Williams* expressly clarified what it means if a person is living as a spouse.

{¶ 19} As to "cohabitating," 71 A.L.R.5th 285 is particularly helpful in understanding this word for purposes of domestic violence statutes. Consistent with the *Williams* requirement that the nature of the relationship be the primary indicia in determining whether persons have or are cohabiting, the majority of courts discussed in the A.L.R. article also place emphasis on the type of relationship that exists or existed between persons at the time of the domestic offense.

{¶ 20} The A.L.R. article cites, for example, the case of *State v. Yaden*, (1997), 118 Ohio App.3d 410, 692 N.E.2d 1097, 71 A.L.R.5th 749, which discusses how other jurisdictions understand the term "cohabitation":

In Alabama, cohabitation means "some permanency of relationship coupled with more than occasional sexual activity between the cohabitants." In California, cohabitation means "an unrelated man and woman living together in a substantial relationship manifested principally by a permanence, or sexual, or amorous intimacy." In Delaware, the alimony statute defines cohabitation as "regularly residing with an adult of the same or opposite sex, if the parties hold themselves out as a couple, and regardless of whether the relationship confers a financial benefit." The Delaware Supreme Court has defined cohabitation as an "arrangement existing when two persons live together in a sexual relationship when not legally married." In New Jersey, cohabitation is "generally residing together in a common residence *** where they generally engage in some, but not necessarily all of the following: meals taken together at the residence; departing from and returning to the residence of the other for employment and/or social purposes; maintaining clothing at the other's residence; sleeping together at the residence, or residence of the other; receiving telephone calls at the residence or residence of the other." The court also cited the following definitions: in Illinois, "living together as husband and

wife"; in Iowa, "a significant live-together relationship"; in Kentucky, "the mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people including but not necessarily dependent on sexual relations"; in Maryland, "living together as husband and wife without a legal marriage having been performed"; in North Carolina, "living together as man and wife, though not necessarily implying sexual relations"; in South Carolina, "living together in the same house"; in Texas, "dwelling or living together; community of life," or "doing things ordinarily done by spouses"; and in Virginia, "living together permanently or for an indefinite period and assuming the duties and obligations normally attendant with a marital relationship."

Yaden, 414, quoted in 71 A.L.R.5th, *4.

{¶ 21} The A.L.R. article also discusses how the federal domestic violence statutes use the term "cohabitation."

When used as a preposition in statutes generally, and specifically as used in Violence Against Women Act (VAWA) provision defining "intimate partner" as a person who has cohabited with the abuser "as a spouse," the word "as" means in the role, capacity, or function of, and in a manner similar to, or like. 18 U.S.C.A. § 2261(a)³, 2266(A). *U.S. v. Barnette*, 211 F.3d 803 (4th Cir. 2000).

³§2261. Interstate domestic violence

(a) Offenses.

71 A.L.R.5th, *3.

{¶ 22} Because of the magnitude of legal authority defining the term "cohabitation" for purposes of different domestic violence statutes, I must dissent from the majority opinion.

{¶ 23} As noted by *Williams*, cohabitation means the "sharing of familial or financial responsibilities **and** consortium." *Id.*, 465, emphasis added. When two unmarried people share financial responsibilities **and** engage in consortium with one another, what else have we done historically as a society other than to recognize that relationship as one that possesses the "design, qualities, significance or effect of marriage." See, *State v. Ward*, Green App. No. 2005-CA-75, 2006-Ohio-1407, ¶31-¶36.

(1) Travel or conduct of offender. A person who travels in interstate or foreign commerce or enters or leaves Indian country or within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(2) Causing travel of victim. A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner ***."

{¶ 24} When two unmarried people are deemed cohabitants under the domestic violence statute, they attain a legal status: each may prosecute the other person for an act of violence under the statute. It is a crime quite different from a general assault, precisely because of the special intimacy of the parties.

{¶ 25} For the foregoing reasons, I would find R.C. 2919.25 unconstitutional because it conflicts with the Ohio Constitution, Art. XV, § 11.