THURSDAY, MARCH 16, 1995 A PUBLICATION OF AMERICAN LAWYER MEDIA, L.P. VOL.106, NO.51 $1.00

DAILY REPORT

FULTON COUNTY DAILY REPORT ESTABLISHED 1890

Win-Win Ruling on Domestic Partners?

BOTH SIDES SEE PRECEDENT IN SPLIT DECISION

SUSAN MCCARTER/DAILY REPORT

G. Stephen Parker claims victory, saying his clients' "main interest was stopping a new Atlanta insurance program that could have been very costly."

BY DON J. DeBENEDICTIS
Staff Reporter

The Georgia Supreme Court's fractured decision late Tuesday upholding and voiding parts of Atlanta's gay rights and domestic partners ordinances left both sides claiming they had not only won the case but set important precedent as well.

The decision is the first time a state high court has approved a municipality's right to ban discrimination against gays in its employment or contracting, according to lawyers supporting the city laws in the case.

Those lawyers also say it is the first time a high court has upheld establishment of a registry for unmarried "domestic partners."

It is also just the second time a state's top court has struck down laws extending employee benefits to the homosexual partners of city workers, according to lawyers on both sides.

Lawyers representing state Rep. Billy McKinney (D-Atlanta) and other plaintiffs who challenged the city laws are especially pleased with the court's 4-3 ruling on the benefits issue.

"Our main interest in the case was trying to stop the city from enacting a new insurance program that could have been very costly," says G. Stephen Parker of the conservative Southeastern Legal Foundation, one of the plaintiffs' attorneys.

Parker's colleague on the case, Wendell R. Bird of Atlanta's Bird & Myers, says one early estimate indicated that providing full dependent benefits to the "domestic partners" of unmarried city employees could have cost taxpayers $4 million a year.

The lead opinion by a 4–3 majority of the court "strikes down the key thing, which was defining domestic partners as an alternative family unit," adds Bird, who was brought into the case through his association with the religious-oriented group Family Concerns.

But attorneys for the city and for gay and human rights groups are equally pleased about their victories on two other key issues in the case—and at least one predicts the city can easily rescue the benefits ordinance.

On a 6–1 vote, the court upheld Atlanta's 1986 ordinances banning discrimination based on sexual orientation

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Both Sides Claim Victory after High Court Rulings on Atlanta's Domestic Partner, Gay Rights Laws

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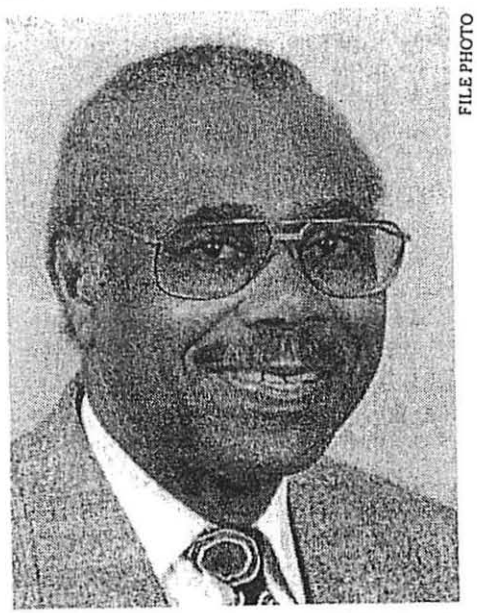
in city hiring and contracting. A 5–2 majority of the court also upheld a 1993 ordinance establishing a city registry on which unmarried couples—gay or straight—may formally declare their domestic partnership relationship. *City of Atlanta v. McKinney*, No. S94A1610; *McKinney v. City of Atlanta*, No. S94X1612 (decided March 14, 1995).



FILE PHOTO

Lawyers representing state Rep. Billy McKinney (D-Atlanta) and other plaintiffs who challenged the city laws are especially pleased with the court's 4-3 ruling on the benefits issue.

"Obviously, ... it's not a complete victory, but the issues we won on are very important," says Assistant City Attorney Robin J. Shahar, who worked on the appeal. "The city feels very strongly about having a nondiscriminatory atmosphere for employees."

Lawyers for gay rights groups in Atlanta and Los Angeles say Tuesday's decision may be the first time a state Supreme Court anywhere in the country has upheld a municipality's authority to ban discrimination based on sexual orientation or to set up such a registry.

Harry H. Harkins of Atlanta, who co-represented the Lambda Legal Defense and Education Fund and the American Civil Liberties Union as a friend of the court in the case, says that while Chicago plus some cities in California, New York and Florida have similar anti-discrimination laws, none has ever reached their state high courts.

Harkins says he is especially pleased with language in the opinion about the meaning of the city laws. "The ordinances do not require any special treatment of the specified classes; they just forbid differential treatment," Justice Norman S. Fletcher wrote for the 6–1 majority.

Los Angeles attorney Thomas F. Coleman, who represented the local chapter of the American Federation of State, County and Municipal Employees plus his own Spectrum Institute as amicus curiae in the appeal, says registries for domestic partners have also never reached state high courts before.

He says such registries have been vigorously opposed by religious and conservative groups in other areas, including in a ballot measure in San Francisco.

The victory is more than symbolic, however, Coleman adds, because it means private companies that want to provide employee benefits to unmarried couples can use the city registry as part of their programs.

Amending Insurance Ordinance?

Coleman, in fact, describes the Georgia Supreme Court's opinion as a complete, not a partial, victory for his side. He recommends the city not bother seeking a rehearing on the issue because the loss over employee insurance and retirement benefits is "correctable."

Coleman says he faxed a memo to Shahar Wednesday morning outlining how the stricken benefits ordinance could be rewritten to satisfy the court majority's concerns. He says the memo recommends amending the existing ordinance rather than writing a new one.

In that portion of the lead opinion on the benefits law, Fletcher held that the city does not have authority under the state constitution or the Home Rule Act, which sets the bounds of municipal power in Georgia, to define family relationships or thereby to extend benefits to employees' domestic partners who are not already dependents under state law.

The controversial ordinance states that "[t]he city of Atlanta recognizes domestic partners as a family relationship and not a marital relationship and shall provide ... health and dental benefits, and any other employee benefit available to a City employee in a comparable manner for a domestic partner ... as for a spouse ... ."

Fletcher wrote, "[I]t is beyond the city's authority to define dependents inconsistent with state law." He was joined by Presiding Justice Robert Benham, and Justices George H. Carley and Norman Thompson.

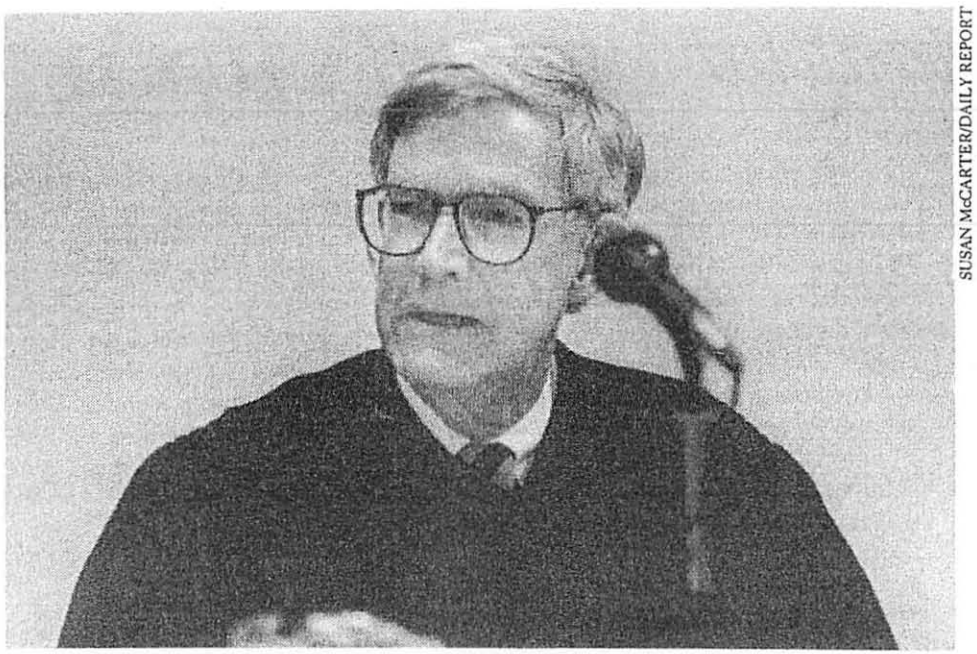
Fletcher noted that the Home Rule Act does not define "dependent," but that other state statutes limit the meaning to "spouse, child or one who relies on another for financial support."

In a dissent, Justice Leah J. Sears said the fact that no one statute defines "dependent" means the city can do so for its purposes without running afoul of the constitution or the act. Chief Justice Willis B. Hunt Jr. and Justice Carol W. Hunstein joined Sears' dissent.

Los Angeles human rights advocate Coleman suggests the ordinance could be fixed to satisfy the majority by removing the references to "spouse" and "family relationship" and adding in a requirement that any domestic partner of a city employee wishing to receive benefits declare that he is dependent on the employee for financial support.

"I think it's going to work. I think this is one of those victories in disguise," Coleman says of the opinion. He predicts Atlanta will emerge with a law that can be used as a model by other local governments that wish to give benefits to gay and unmarried workers.

A different benefits law was struck down recently by the Supreme Court of Minnesota, he says.



SUSAN McCARTER/DAILY REPORT

Writing for the majority, Justice Norman S. Fletcher held that the city does not have the authority to define family relationships.

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On the other side, Bird says he encourages the city to try. If the city makes the change Coleman proposes, "they'll be doing exactly the same thing with dependent as they did with family and spouse," and they'll lose, he says.

"We'll look forward to their trying. It'll make a good second lawsuit."

Shahar could not discuss on the record what her office or the city might do in response to the court's opinion, noting only that the topic was being explored. "There are different options the city has and the city can pursue," she says.

City Attorney Clifford E. Hardwick IV was out sick Wednesday, and Assistant City Attorney Kendric E. Smith, who argued the appeal before the high court, was in a meeting away from the office. Neither could not be reached to comment.

Registry, Bias Rulings

In other portions of the Supreme Court's opinion Tuesday, the justices in the majority and minority shifted.

All the justices except Carley voted that the city may ban discrimination based on sexual orientation or other factors in its hiring and much of its contracting. Since the two ordinances involved "extend only to the city's policies governing its employees and property and to those businesses that state law leaves to the city to regulate, we conclude that they are reasonable laws related to the city's affairs and local government," Fletcher wrote.

In his dissent, Carley argued that state anti-discrimination laws pre-empt the ordinances, because similar state laws do not extend as far.

The third city law covered by the opinion allows "two people of the opposite or same gender who live together in the mutual interdependence of a single home" to register that fact with the city, provided they meet certain conditions. Members of such couples may visit one another in city jails, just like married couples, under the law.

Carley, joined by Thompson, argued the ordinance gives unmarried couples the status of married couples in some respects, contrary to state law.

But Fletcher ruled for a five-member majority that the ordinance could be construed narrowly as establishing just a registry and not as conferring any special rights.

Finally, all seven justices agreed to one portion of the opinion, which held that McKinney and the other plaintiffs could not win money damages against the city over the challenged ordinances. □