IN THE SUPREME COURT OF THE STATE OF VERMONT

LISA MILLER-JENKINS, Plaintiff-Appellant

v.

JANET MILLER-JENKINS, Defendant-Appellee

Supreme Court Docket Number 2007-271

Appeal
From the
Rutland Family Court
Docket Number 454-11-03 Rddm

BRIEF OF THE APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the "law of the case" doctrine precludes revisiting each of the substantive issues raised by the Plaintiff-Appellant in this second appeal to this Court? (pp. 3-8).

2. Whether, apart from the "law of the case" doctrine, the substantive issues asserted by the Plaintiff-Appellant are foreclosed on this appeal? (pp. 9-17).

3. Whether the Family Court properly denied the Plaintiff-Appellant's motion to amend her complaint? (pp. 18-20).

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COUNTERSTATEMENT OF THE CASE

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This action began on November 24, 2003 when the Plaintiff-Appellant, Lisa Miller-Jenkins ("Lisa") filed a "Summons, Complaint for Civil Union Dissolution, Notice of Appearance and Affidavit of Child Custody." (PC 32-34).[1]

Among other things, the Family Court "issued a temporary order on parental rights and responsibilities on June 17, 2004," awarding the Defendant-Appellee, Janet Miller-Jenkins ("Janet"), parent-child contact with IMJ, the child born during the parties' civil union. Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶¶3-4, 912 A.2d 951, 956 (2006)(hereinafter "Miller-Jenkins I").

Subsequent Family Court orders of September 2, 2004, November 17, 2004 and December 21, 2004 respectively held Lisa in contempt for violation of the temporary visitation order; held that both Lisa and Janet had parental interests in IMJ; and refused to give full faith and credit to a conflicting Virginia trial court parentage decision. Id., at ¶¶5-9, 912 A.2d at 956-957.

This Court "granted interlocutory appeal to address the validity of these orders" and concluded, among other things, that the parties' civil union was valid; that the Family Court had exclusive jurisdiction to issue the temporary order; that Janet is a parent of IMJ; and that Lisa was in contempt. Id. at ¶2. 912 A.2d at 956. This Court's decision was issued on August 4, 2006.

This Court also: (1) determined that Vermont law properly applied to the question of parentage; (2) addressed Lisa's asserted federal constitutional claim as to her parental

[1] In this brief, "PC" refers to the Printed Case prepared and submitted by the Plaintiff-Appellant.

rights; and (3) ruled on Lisa's arguments concerning full faith and credit, including its interplay with the federal Defense of Marriage Act ("DOMA") and the federal Parental Kidnapping Protection Act ("PKPA"). Id. at ¶¶9-30, 59-61, 912 A.2d at 957-962, 971-972.

Lisa filed a Petition for Writ of Certiorari in the United States Supreme Court on February 7, 2007. Miller-Jenkins v. Miller-Jenkins, 2007 WL 43268 (Petition for Writ). The Petition was denied April 30, 2007. Miller-Jenkins v. Miller-Jenkins, 127 S.Ct. 2130 (2007).

Following these interlocutory appellate proceedings, this case returned to the Rutland Family Court for trial which occurred on April 2-5, 2007. (PC 30). The Family Court (Cohen, J.) issued "Findings of Fact, Conclusions of Law, and Order" on June 15, 2007. (PC 1-16, 30). Lisa filed a Notice of Appeal on July 11, 2007. (PC 31).

Statement of Facts

The facts relevant to this case, and to this appeal in particular, have been well traversed both by this Court, Miller-Jenkins I, supra, 2006 VT 78 ¶¶3-5, 912 A.2d at 956, and, most recently, by the Family Court after trial on the merits. (PC 1-4). Janet accepts those judicial statements and findings of facts that are pertinent to this appeal and notes that Lisa nowhere in her briefing asserts any relevant challenge to either the Family Court's findings of fact or this Court's prior recitation of the facts.

ARGUMENT

I. THE DOCTRINE OF "LAW OF THE CASE" PRECLUDES REVISITING EACH OF THE SUBSTANTIVE ISSUES RAISED BY THE PLAINTIFF-APPELLANT IN THIS SECOND APPEAL OF THOSE SAME ISSUES TO THIS COURT.

Lisa argues on appeal a series of substantive issues of law – asserted federal constitutional rights as a parent, the effect of DOMA, the proper choice of law for the parentage determination and the validity of the parties' civil union. Each of these issues was raised by Lisa and resolved by this Court in Miller-Jenkins I. This Court should rely on the "law of the case" doctrine to dispose of all of these issues.

A. The Doctrine Of The "Law Of The Case."

This Court has a long history of adherence to the doctrine of the "law of the case." In Coty v. Ramsey Associates, Inc., 154 Vt. 168, 573 A.2d 694 (1990), the Court stated:

> "It is a rule of general application that a decision in a case … of last resort is the law of that case on the points presented throughout all the subsequent proceedings therein, and no question then necessarily involved and decided will be reconsidered by the Court in the same case on a state of facts not different in legal effect." … [T]he result [of reversing former decisions in the same case] would be mischievous because if all such questions are to be regarded as still open for discussion and revision in the same case, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted.

Id., 154 Vt. at 171, 573 A.2d at 696 (quoting Perkins v. Vermont Hydro-Electric Corp., 106 Vt. 367, 415-416, 177 A. 631, 653 (1934), quoting Barclay v. Wetmore & Morse Granite Co., 94 Vt. 227, 230, 110 A. 1, 2 (1920)).[2]

Although the principle is well-established and "firmly grounded on considerations of public policy," and is, in fact, a rule of practice, exceptions are limited to cases where "the evidence pertinent to the [previously decided] issues at the retrial are materially different." Barclay, supra, 110 A. at 2; see also Bradley v. Blandin, 94 Vt. 243, 110 A.2d 309, 314 (1920)("No attempt is made to point out wherein the evidence is different in legal effect" (emphasis added)); Dietrich v. Hutchinson, 75 Vt. 389, 56 A. 6 (1903)(amendment after remand brought no new "material fact upon the record").

To the argument that, "if there is error in the decision and it is ever to be reversed, it should be done in the same court," this Court in Perkins reasoned that, "however sound this may be in theory … the result would be mischievous …." Perkins, supra, 177 A. at 653. Moreover, it is for this reason that appellate courts, like this Court, make provision for applications for rehearing. See Wedge v. Vermont Central Ry. Co., 82 Vt. 266, 73 A. 580 (1909).[3]

Finally, it is worth noting in this regard that allowing relitigation of issues previously resolved by this Court on permissive interlocutory review – as in this case –

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[2] The Perkins Court also cites to 17 earlier decisions of this Court "illustrat[ing] the true import and meaning of the phrase 'law of the case'," as applying to "previous adjudications of an appellate court in the same case." Perkins, supra, 177 A. at 653-654.

[3] Lisa moved to reargue in Miller-Jenkins I, and she sought to bring this Court's attention to the very issues she seeks to relitigate in this appeal, i.e., choice of law on the parentage determination, the asserted violation of Lisa's federal constitutional rights as a parent, full, faith and credit and the validity of the parties' civil union. (Motion to Reargue, ¶¶1-5, 8-9). (A copy of the Motion to Reargue is included in the Addendum to this brief).

undermines "a central purpose" of such appeals "which is to advance the ultimate termination of a case." State v. Hunt, 150 Vt. 483, 492, 555 A.2d 369, 375 (1988).

B. The Federal Issues Of Parental Rights, Full Faith & Credit, The DOMA And The PKPA Were Previously Decided By This Court And Have Become The "Law Of The Case."

In Miller-Jenkins I, this Court devoted considerable attention to Lisa's arguments concerning federal Full Faith & Credit and the potential relevance and interplay of the DOMA and the PKPA. Miller-Jenkins I, supra, 2006 VT 78 ¶¶9-30, 912 A.2d at 957-962. Ultimately, this Court concluded that jurisdiction over visitation was properly in the Vermont courts and that the Vermont courts were not bound to follow a conflicting Virginia visitation order. Id.

Similarly, this Court addressed Lisa's argument that her federal constitutional rights as a parent were violated and ruled against Lisa on state procedural as well as substantive grounds. Id. at ¶59.

As noted above, Lisa filed a Motion to Reargue seeking reconsideration of this Court's determination of these various federal issues. (Addendum, pp. 4-6, Motion to Reargue, ¶¶4-5, 7-8). That motion was denied on November 9, 2006. Miller-Jenkins I, supra, 2006 VT 78, 912 A.2d at 951.

Now, in this second visit to this Court, Lisa seeks to relitigate each of these complex federal issues while devoting a mere two pages of her brief to the issues and simply incorporating by reference her arguments to this Court in the prior interlocutory appeal in this case. (Plaintiff's Brief, pp. 25-27).

There can be no clearer case for the application of the "law of the case" doctrine where a party attempts to relitigate pure questions of law and relies squarely on prior briefing. In short, absolutely nothing new has been brought to this Court's attention; and the prior rulings must stand.[4]

C. The Issue Of Whether Vermont Or Virginia Law Applies To The Determination Of Parentage Was Previously Decided By This Court And Has Become The "Law Of The Case."

In Miller-Jenkins I, this Court addressed Lisa's argument that Virginia, and not Vermont, law should apply to the issue of whether Janet is a parent of IMJ. Miller-Jenkins I, supra, 2006 VT 78 ¶¶60-61, 912 A.2d at 971-972. Lisa expressly argued the issue, albeit minimally, on the first appeal (PC 106-107), and Janet extensively briefed the issue on the first appeal as well. (Defendant's Brief in consolidated Docket Nos. 2004-443 and 2005-031, pp. 13-17). (A copy of Janet's briefing on the issue in the first appeal is included in the Addendum to this brief).

This Court first held that Lisa had not preserved the issue and then went on to the substance of the question, determining that Vermont law properly applied to the parentage question. Miller-Jenkins I, supra, 2006 VT 78 ¶¶60-61, 912 A.2d at 971-972.

In the current, second appeal, Lisa argues no relevant, new material facts affecting this choice-of-law question. (See generally Plaintiff's Brief, pp. 20-25). Rather, she

[4] On her claim concerning federal constitutional parental rights, Lisa somehow thinks it significant as to the question of preserving the issue for appeal that, post-Miller-Jenkins I, she filed her Reply and Affirmative Defenses to Janet's Counterclaim and asserted constitutional parental rights. (Plaintiff's Brief, p. 25). However, Lisa never explains or cites any supporting case law as to why the "law of the case" doctrine does not apply equally to this Court's prior ruling (also subject to Lisa's unsuccessful Motion to Reargue) that this argument was waived.

simply shifts her legal focus slightly. Her first appeal included some modest references – with no case citations – to the parties' various Virginia and Vermont contacts. (PC 106-107). Her second appeal now relies on a more specific effort – again, with no case citations – to assertedly apply the six factors in the Restatement (Second) Conflict of Laws §6 to establish Virginia as the state with the most significant relationship to the issue of parentage. (Plaintiff's Brief, pp. 20-25).

However, this Court expressly acknowledged its adherence to the "most significant relationship" test in Miller-Jenkins I and held that Vermont law properly applied to the parentage issue in this case. Miller-Jenkins I, 2006 VT 78 ¶60, 912 A.2d at 971. On this record, it is impossible to discern any reason why the "law of the case" doctrine should not apply to both the procedural and substantive issues resolved in Miller-Jenkins I on the question of choice of law and the parentage determination.[5] Moreover, this Court's prior determination of the question was clearly correct. (Addendum, pp. 8-12, Defendant-Appellee's briefing on the first appeal).

D. The Issue Of Whether Vermont Or Virginia Law Applies To The Question Of The Validity Of The Parties' Civil Union Was Previously Decided By This Court And Has Become The "Law Of The Case."

In Miller-Jenkins I, this Court analyzed the question of the validity of the parties' Vermont civil union at some considerable length in response to various arguments by Lisa that the civil union was void ab initio solely as a matter of Vermont law. Miller-Jenkins I, supra, 2006 VT 78 ¶¶31-40, 912 A.2d at 962-965; PC 92, 104-106; 133-140

[5] As with the federal issues discussed in Section I.B., above, Lisa makes no attempt to argue that her failure to preserve this choice-of-law issue prior to the previous appeal is not also independently subject to the "law of the case" doctrine.

(Lisa's briefing on the first appeal). Applying Vermont law, this Court held the parties' Vermont civil union valid and not void. Id. at ¶40, 912 A.2d at 965.

Now, in this second appeal, Lisa again argues that the parties' civil union was never valid, simply shifting ground to argue that it must be declared void as a matter of Virginia law. (Plaintiff's Brief, pp. 6-20). Putting aside for the moment the question of whether Lisa can, at this late date, switch her litigation position on choice of law, see Section II.C., below, the ruling of this Court in Miller-Jenkins I that the parties' civil union was valid is the "law of the case" and is not open for reconsideration in this appeal.

Again, Lisa points to no new facts "different in legal effect" that should lead this Court to revisit its ruling that the civil union was valid or any "question then necessarily involved and decided." Coty, supra, 154 Vt. at 171, 573 A.2d at 696. Rather, she simply desires this Court to change its ruling in response to a different – and totally opposite – legal theory. Putting aside for the moment the merits of this alternative legal theory, see Section II.C., below, there is simply no legal basis for the proposition that the "law of the case" doctrine does not apply when a party with an issue, otherwise subject to the doctrine, seeks to avoid it by arguing a legal theory open, but eschewed, in the first appeal.

For these reasons, the "law of the case" doctrine precludes reopening the question of the validity of the parties' civil union.

II. EVEN APART FROM THE APPLICATION OF THE "LAW OF THE CASE" DOCTRINE, THE PLAINTIFF-APPELLANT'S ARGUMENTS ARE FORECLOSED ON THIS APPEAL.

For the reasons set forth in Sections I.B., I.C. and I.D., above, the "law of the case" doctrine disposes of all the substantive issues presented by Lisa in this appeal. In addition, there are other grounds that independently render this appeal unavailing.

A. The Federal Issues Of Parental Rights, Full Faith & Credit, The DOMA And The PKPA Were Not Properly Preserved For Review.

It is axiomatic that "matters not raised at trial may not be raised for the first time on appeal." Jordan v. Nissan N. Am., Inc. et al., 2004 VT 27 ¶10, 176 Vt. 465, 470, 853 A.2d 40, 45 (2004), citing Harrington v. Dep't of Employment & Training, 152 Vt. 446, 448, 566 A.2d 988, 990 (1989); Limoge v. People's Trust Co., 168 Vt. 265, 270, 719 A.2d 888, 891 (1998)(same); see also V.R.A.P. 28(a)(4)(brief of the appellant must set out "how the issues were preserved").

Here, Lisa states only that these federal issues were set out in affirmative defenses to Janet's counterclaim and were briefed in the Family Court before the interlocutory appeal and for the interlocutory appeal to this Court. (Plaintiff's Brief, pp. 25, 26). However, at the trial on the merits in April 2007 – the subject of the present appeal – Lisa does not, and cannot, assert that these federal issues were raised before the trial court. They were not, as a review of Lisa's trial memoranda indicate. (See generally SPC 177-256).[6] As a result, none of the federal issues was addressed in the trial court's Findings

[6] "SPC" refers to the "Supplemental Printed Case of Appellant."

of Fact, Conclusions of Law, and Order (see generally PC 1-16) and have thus not been properly preserved for review.

For this independent reason, this Court should not address any of the federal issues raised by the Plaintiff-Appellant.[7]

B. The Plaintiff-Appellant Cannot Raise A New Challenge To The Issue Of Whether Vermont Or Virginia Law Applies To The Determination Of Parentage That Was Not Raised In The First Appeal.

It is undisputed that Lisa briefed and sought resolution of the question of choice of law concerning parentage in Miller-Jenkins I. (PC 106-107).[8] Although this Court found the issue was not preserved, it also went on to resolve the question substantively in favor of Vermont law under the "most significant relationship" test. Miller-Jenkins I, supra, 2006 VT 78 ¶60, 912 A.2d at 971.

In the present appeal, the best that can conceivably be said is that Lisa seeks to argue the choice-of-law issue from a new legal perspective, focusing more directly on the factors set forth in Restatement (Second) of Conflict of Laws §6. (Plaintiff's Brief, pp. 20-25). However, appeals may not be prosecuted in piecemeal fashion; and, therefore, where Lisa has "already fully contested" the issue of parentage and choice of law, "[this Court] will not now consider challenges that should have been raised during the earlier determination of this issue. … To hold otherwise would be contrary to a central purpose

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[7] This Court need not – and should not – address the merits of any of Lisa's asserted federal issues, particularly where, as here, it is clear that this Court properly resolved each of these questions on the first appeal in Miller-Jenkins I.

[8] Lisa also challenged this Court's determination of the issue in her Motion to Reargue, ¶¶1-3. (Addendum, pp. 2-4).

of granting interlocutory appeals, which is to advance the ultimate termination of a case." State v. Hunt, 150 Vt. 483, 492, 555 A.2d 369, 375 (1988); see also Havill v. Woodstock Soapstone Co., 2007 VT 17 ¶10, 924 A.2d 6, 10 (2007)(no appeals in piecemeal fashion; "claims which are not raised in the initial appeal may not be brought on remand").

For this additional, independent reason, this Court should not address the issue of choice of law regarding parentage.[9]

C. The Plaintiff-Appellant's Attempt To Revisit The Question Of The Validity Of The Parties' Vermont Civil Union Is Unavailing For Several Reasons.

In Miller-Jenkins I, this Court exercised its discretion to reach the merits of the question of the validity of the parties' Vermont civil union as it involved a pure question of law and a matter of public interest and ruled that the civil union was valid. Miller-Jenkins I, supra, 2006 VT 78 ¶¶33, 40, 912 A.2d at 963, 965. In doing so, this Court addressed the arguments made by Lisa that consisted strictly of questions under Vermont law and, in particular, 15 V.S.A.§6. Id. ¶¶34-39, 912 A.2d at 963-965.

For the same reasons set forth in Section II.B., above, Lisa cannot now bring a new legal challenge to the same determination of an issue of law. Where the validity issue has been fully contested, this Court will not consider a different challenge that should have been raised in the first appeal. State v. Hunt, supra; Havill, supra. To do so undermines the purpose of the interlocutory appeal this Court previously allowed Lisa.

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[9] It is worth noting that Lisa's contention seems to be that this Court has yet to apply the "most significant relationship" test and, therefore, should do so now. This is curious since in Miller-Jenkins I, this Court expressly applied that very test to the parentage choice-of-law question. Miller-Jenkins I, supra, 2006 VT 78 ¶60, 912 A.2d at 971.

Second, this Court should find that Lisa has waived the issue of the choice of Virginia law. Not only did Lisa fail to argue the application of Virginia law on the first appeal in either her initial or reply briefs (PC 104-106, 133-140), she also continued to press solely Vermont law on civil union validity in her Motion to Reargue, her Proposed Amended Complaint and in her Reply and Affirmative Defenses to Counterclaim. (Addendum, p. 6 [Motion to Reargue, ¶9]; PC 157, 160-162, 170, 172). She made this argument as recently as March 6, 2007. (PC ii, 163-164, 167-168, 173-174). It was only on the first day of trial, April 2, 2007 – some three years and four months after the civil union dissolution complaint was filed – that Lisa for the first time asserted that Virginia law applies to the validity of the parties' civil union. (SPC i, 177-186).

Under these circumstances, where Lisa has simply changed course on choice of law after this Court ruled against her under Vermont law, it is proper for this Court to hold that Lisa has waived this issue and cannot proffer it at this late date. See Havill, supra, 2007 VT 17 ¶10, 924 A.2d at 10, citing In re Hart, 167 Vt. 630, 631, 715 A.2d 640, 641 (1998)(for proposition that "issues not raised on appeal are waived for purposes of later review"); cf. Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 739 n.15 (11th Cir. 1995)(party waived choice-of-law issue and could not raise it on appeal where the party "acquiesced in the court's choice of law decision throughout trial, changing course only after the court [ruled against it]").[10]

[10] Lisa has maintained that her argument on the absence of a valid civil union cannot be waived "because it is jurisdictional." Miller-Jenkins I, supra, 2006 VT 78 ¶33, 912 A.2d at 963; see also PC 106, 139 and Plaintiff's Brief, pp. 6-7 and 20. On the first appeal, this Court "question[ed] that characterization," Miller-Jenkins I, supra, 2006 VT 78 ¶33, 912 A.2d at 963, and rightly so. In fact, it is crystal clear that the Family Court had jurisdiction of this proceeding whether conceived of as the dissolution of a Vermont civil union in accordance with the complaint actually filed by Lisa on November 24,

2003 (PC 32-34) or as a claim that the civil union was void ab initio, i.e., for an annulment, as Lisa argued in her first appeal to this Court and currently in this second appeal albeit on other legal grounds.

Under the Vermont civil union statute, the "law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union." 15 V.S.A. §1204(d). The parties to a civil union also have the benefit of seeking an affirmance of their civil union under 15 V.S.A. §7 if the validity of the union is "denied or doubted by either of the parties." See 15 V.S.A. §1204(e)(24).

Likewise, it is clear that the Family Court has "exclusive jurisdiction to hear and dispose of … (4) All annulment and divorce proceedings filed pursuant to chapter 11 of Title 15." 4 V.S.A. §454(4). More particularly, a complaint for divorce or annulment may be brought if either party has resided within Vermont for the required period of time and if the cause is brought in the county where one of the parties resides. 15 V.S.A. §§592-593. It is undisputed that Janet was a resident of Rutland County at all relevant times and moved to Vermont in August 2002, some 15 months prior to the filing of the dissolution complaint. (PC 1, 3, 32).

In short, there is no doubt that the Family Court, and this Court, have subject matter jurisdiction to address the question of the validity of the parties' civil union and, indeed, Lisa is asking this Court both to address the validity issue so as to declare the parties' civil union void and to allow the amendment of her pleadings to include such a claim. See Section III., below. Therefore, as a matter of substantive law, there is no "jurisdictional" bar to the application of waiver to Lisa's assertions regarding the validity of the parties' civil union.

Finally, to the extent that Lisa assumes – again, without any citation of authority – that a declaration that the parties' civil union is void ab initio would leave the Vermont court without jurisdiction to address issues involving the child IMJ, two points are worth noting. Fist, Lisa appears to realize that she cannot make the subject matter jurisdiction argument directly as to the issue of parentage but rather must make it turn, if at all, on the question of civil union validity. Second, Vermont law is clear that the Family Court in "an action under this chapter," i.e., Title 15, chapter 11, including an action for an annulment, see 15 V.S.A. §§591-593, has authority to make "an order concerning parental rights and responsibilities of any minor child of the parties." 15 V.S.A. §665(a); see In re S.B.L., 150 Vt. 294, 299, 553 A.2d 1078, 1082 (1988)("the child custody standards of §652, now 15 V.S.A. §665, apply only to divorce or annulment proceedings …"); cf. Heffernan v. Harbeson, 2004 VT 98, ¶11, 177 Vt. 239, 243, 861 A.2d 1149, 1153 (2004)(noting that standards in §665(a) apply "to orders issued under Title 15, chapter 11"). Therefore, there can also be no subject matter jurisdiction bar to the Family Court issuance of orders relating to the child IMJ – again, regardless of the validity of the parties' civil union.

Third, on the merits of the issue itself, Lisa is simply wrong as a matter of law in arguing that somehow Vermont does not properly apply Vermont law to determine the validity of a Vermont civil union entered into in Vermont. It is axiomatic that "[a] marriage contract will be interpreted here according to the law of the state of its making, so long as to do so will not violate the public policy of the State of Vermont." Poulos v. Poulos, 169 Vt. 607, 737 A.2d 885, 886 (1999)(divorce action, seemingly of Vermont residents married 20 years earlier in New York; applying New York law to determine validity of the marriage); Lariviere v. Lariviere, 102 Vt. 278, 147 A. 700 (1929)("the validity of a marriage is determined by reference to the law of the state or country wherein it is celebrated"); State v. Shattuck, 69 Vt. 403, 38 A. 81 (1897)(same); see also Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 430, 4 S.E.2d 364, 366 (1939)("Every state has the power to determine who shall assume or occupy the matrimonial relationship within its borders").

This Court conclusively determined in Miller-Jenkins I that these parties had a valid Vermont civil union. Miller-Jenkins I, 2006 VT 78 ¶40, 912 A.2d at 965.

In an attempt to avoid this obvious result, Lisa points this Court to a plethora of case citations. (Plaintiff's Brief, pp. 10-14 and nn. 2-6). However, not a single case supports her argument. Most of the cases stand for the unexceptional proposition that the state of the parties' residence can refuse to recognize the residents' out-of-state marriage and might declare it void under the law of the state of residence. (See generally Plaintiff's Brief, pp. 10-12 and nn. 2-4).[11] No one disputes that the state of domicil has

[11] Of all of the cases discussed at pp. 10-12 and nn. 2-4 of Lisa's brief, excepting those also cited in footnote 5 and discussed below, every case but one involved the court of the domicil of the parties addressing the circumstances of an out-of-state marriage. In

the power to decide whether an out-of-state marriage by its residents will be recognized and that, apropos of the present case, that a Virginia court – had it been asked – could presumably have ruled on the question of the validity of the parties' civil union as a matter of Virginia law.[12] However, that is not this case. Lisa filed for the dissolution of her Vermont civil union in a Vermont Family Court. There is no reason why Vermont would not apply Vermont law to determine the validity of that civil union in a Vermont dissolution proceeding.

What remains is Lisa's assertion that

> There are numerous examples of the forum state using choice of law principles to apply non-forum law of the parties' domiciliary at the time of marriage to void a marriage only on the basis of strong public policy of the non-forum domiciliaries' home state. The family court should have done likewise below.

(Plaintiff's Brief, pp. 12-13).

To support that proposition, Lisa cites seven (7) cases. (Plaintiff's Brief, p. 13 n.5). However, none of these cases supports the notion that Vermont should apply Virginia law to the question of the validity of a Vermont civil union. Indeed, none of

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short, none of these cases involved a court addressing a forum marriage and applying out-of-state law. The one exception is Meisenhelder v. Chicago & N.W. Ry. Co., 170 Minn. 317, 213 N.W. 32 (1927). Meisenhelder involved the interpretation of a federal statute that directed that the status of widow was to be determined under the law of the state where the injury resulting in death occurred. Quite obviously, that federal statutory choice-of-law provision has no relevance to the present case.

[12] It is for this reason that Lisa is simply off-base with her repeated mantra that Vermont is "export[ing] its preferences to residents of every other state" and "impos[ing] its domestic relations choices on other states." (See, e.g., Plaintiff's Brief, p. 13). Vermont is applying Vermont law to a Vermont civil union in a Vermont dissolution proceeding. It is not telling any other state how it must view a Vermont civil union under its law.

these cases involves a court applying the law of another state to determine the validity of a marriage performed in the forum state.[13]

Finally, Lisa, shorn of any case law support for her position, makes a bald plea to this Court to simply not allow "non-residents to evade the public policy of their home state's family law with a trip to Vermont." She argues also that there is no common law right to same-sex unions, the absence of which assertedly means that no citizens of other states without such unions may validly enter into a same-sex union in Vermont. (Plaintiff's Brief, pp. 13-14).

Putting aside the fact that, once again, Lisa provides no legal support for this proposition[14], two things are worth noting. First, Lisa seems to have returned to making

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[13] Specifically: (1) Marek v. Flemming, 192 F. Supp. 528 (S.D.Tex.) rev'd and remanded on other grounds 295 F.2d 691 (5th Cir. 1961), involved an interpretation of a federal social security law choice-of-law provision determining "widow" on the basis of the law of intestate succession under the law of domicil at time of death; (2) Cummings v. United States, 34 F.2d 284 (D. Minn. 1929), also involved a federal choice-of-law provision for application of a "war-risk" insurance policy with the federal statute looking to the law of the place of residence at the time of marriage or at the time of death to determine the lawful widow; (3) Jay v. Jay, 212 A.2d 331 (D.C.App. 1965), involved District of Columbia residents and the D.C. court turned to Maryland law, not forum law, to determine the validity of the D.C. parties' Maryland marriage; (4) Hack v. Industrial Comm'n, 74 Ariz. 305, 248 P.2d 863 (1952), was an Arizona court considering capacity to marry in Arizona of California residents, one of whom had a Wisconsin divorce subject to a one-year bar on remarriage; Arizona court looked to Wisconsin law for party's status in order to determine capacity to marry in Arizona; law of domicil never mentioned; (5) Fisch v. Marler, 1 Wash.2d 698, 97 P.2d 147 (1939), involved a Washington action by a Washington resident to void a Montana marriage more than 20 years earlier when the parties were Idaho residents; the Washington court put itself in the position of the domiciliary court (Idaho) at the time of the marriage to determine validity, at that time, of an out-of-state marriage; (6) Johnson v. State Compensation Comm'r, 116 W.Va. 232, 179 S.E. 814 (1935), involved a determination by a West Virginia court that a West Virginia marriage of West Virginia residents was not valid because one party was not single and thus not free to marry following a Virginia divorce; and (7) People v. Steere, 184 Mich. 556, 151 N.W. 617 (1915), involved a criminal prosecution for spousal abandonment and court found husband had not abandoned his wife in Michigan.

an argument about determining and applying Vermont law, not Virginia law. Second, Lisa seems to be asking this Court – which has already held that Vermont's "reverse evasion" statute, 15 V.S.A. §6, does not bar non-residents from obtaining a Vermont civil union, Miller-Jenkins I, supra, 2006 VT 78 ¶¶34-40, 912 A.2d at 963-965 – to create a "common law" rule of reverse evasion to accomplish what this Court has held the Legislature chose not to do.

Such an action by a court would be extraordinary. Simply put, no state has done this absent a statute. Moreover, it requires no citation of authority to note that Americans are generally free to travel to any state to marry provided they satisfy the requirements of marriage in the jurisdiction in which they seek a marriage license.[15] Vermont's statute, 15 V.S.A. §6, is a rare exception, arguably also rarely enforced.

For each of these additional reasons, Lisa's efforts to revisit the question of the validity of the parties' civil union should not be entertained by this Court.

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[14] In addition to an absence of supporting legal citations, it would be remiss for Janet to fail to note a glaring misrepresentation of the law by Lisa. In seeking to convince this Court of the importance of Virginia policy that she wants this Court to apply, Lisa asserts that "Virginia still criminalizes sodomy …," (Plaintiff's Brief, p. 15), without even mentioning Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003), which nullified all sodomy laws, including Virginia's, with respect to private, consensual, adult conduct.

[15] Today, "people in the 'bridal consulting' business refer to some weddings as 'destination' weddings, in which couples travel to a 'neutral' location for the wedding rather than having it at the home of either participant." Jennifer Gerarda Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage, 68 S. Cal. L. Rev. 745, 775 n.93 (1995). There are wedding websites devoted to destination weddings. See, e.g., "The Destination Wedding and Eloping FAQ," www.whollymatrimony.com/Webrings/FAQ.html#whatis (Q. 1.1. noting that 10% of weddings today are destination weddings); see also www.destinationweddingsbytheknot.com/homepage.aspx and www.theknot.com/keywords/sc_147_527.shtml (dedicated to planning and destination selection respectively).

III. THE TRIAL COURT PROPERLY DENIED THE MOTION TO AMEND THE COMPLAINT.

On March 6, 2007 – some three years and three months after the original November 24, 2003 dissolution complaint (PC 32-34) – Lisa moved to amend her complaint. (PC 29, 165-174). Specifically, Lisa sought to amend to: (1) seek a declaration as to the validity of the parties' civil union; and (2) make changes to the original complaint forms to essentially delete all references to minor children and to any issues for determination involving minor children. (PC 165-174).

The Family Court (Cohen, J.) denied the motion to amend by written ruling, dated March 28, 2007. (PC 17-19, 29). The Family Court's ruling was proper.

A. The Ruling On A Motion To Amend Will Only Be Overturned For An Abuse Of Discretion.

Under Vermont law, a motion to amend pleadings rests within the sound discretion of the trial court; and a trial court ruling on such a motion is reviewed by this Court only for an abuse of discretion. Hickory v. Morlang, 2005 VT 73 ¶5, 178 Vt. 604, 605, 878 A.2d 318, 320 (2005), citing Lillicrap v. Martin, 156 Vt. 165, 170, 591 A.2d 41, 44 (1989); Haverly v. Kaytec, Inc., 169 Vt. 350, 355, 738 A.2d 86, 90 (1999)(same); Brown v. Whitcomb, 150 Vt. 106, 108-109, 550 A.2d 1, 3 (1988)(same), citing Bevins v. King, 143 Vt. 252, 254-255, 465 A.2d 282, 283 (1983); Desrochers v. Perrault, 148 Vt. 491, 493, 535 A.2d 334, 336 (1987)(same).

There was no abuse of discretion in the Family Court's denial of Lisa's motion to amend.

B. The Family Court Did Not Abuse Its Discretion In Denying The Motion To Amend.

As noted above, Lisa's proposed amendments focused on: (1) alleging a claim that the parties' civil union was not valid and void ab initio; and (2) removing all matters concerning the parties' child, IMJ.

As to the former issue, "the amended bill introduces no issue not already decided." Sheldon v. Clemons, 82 Vt. 169, 72 A. 687, 688 (1909). Here, nearly identical to Sheldon, "… the losing party asks leave to file an amended bill in effect to rehear the same issues of fact previously heard and determined." Id. Therefore, the motion to amend as to the validity of the civil union was certainly properly denied. Id.[16]

As to the proposed amendments concerning the child IMJ, the analysis of Sheldon is equally applicable. It has been conclusively decided that both Lisa and Janet are parents of IMJ, and, as the Family Court noted in denying this motion, that court must make an order governing parental rights and responsibilities regardless of what Lisa's pleadings do or do not include concerning IMJ. (PC 18).[17]

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[16] Given that the issue of the validity of the parties' civil union was briefed and decided by this Court in Miller-Jenkins I, this case should be treated as if that validity issues was raised by the existing pleadings. See Haverly, supra, 169 Vt. at 355, 738 A.2d at 90. Therefore, no amendment is or was necessary. Moreover, even if there was error in the denial of the motion – which Janet does not concede – for all of the reasons set forth in this brief it was certainly harmless.

[17] The Family Court provided other grounds for its ruling which also support the exercise of its discretion to deny the motion to amend. (PC 17-19). In addition, Lisa asserts that her amended pleading would only have required Janet to plead "a denial that there were no children of the union and an affirmative assertion that IMJ was a child of the union." (Plaintiff's Brief, p. 29). Of course, so framed, the issue was briefed and decided by this Court in Miller-Jenkins I; and no amendment to the pleadings was necessary. See Haverly, supra.

For these reasons, the Family Court properly denied the Plaintiff-Appellant's motion to amend her complaint.

CONCLUSION

For all of the foregoing reasons, the Defendant-Appellee, Janet Miller-Jenkins, respectfully submits that the Family Court's Findings of Fact, Conclusions of Law, and Order, dated June 15, 2007, should be affirmed in its entirety.

DATED: November 16, 2007

JANET MILLER-JENKINS

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ADDENDUM

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