

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
CIVIL ACTION NO. SJ 2004-0232

RAYMOND L. FLYNN, and)
THOMAS A SHIELDS)
Plaintiffs,)

v.)

DOUGLAS JOHNSTONE, as he)
is the Clerk of the town)
of Provincetown,)

and)

JOHN J. LONG, as he is)
the Clerk of the city of)
Somerville,)

and)

DAVID J. RUSHFORD, as he)
Is the City Clerk of the)
City of Worcester,)

Defendants)

DEFENDANT DAVID J. RUSHFORD'S
MEMORANDUM IN SUPPORT OF HIS
MOTIONS TO DISMISS UNDER MASS.
R.CIV.P. 12(B)(1) AND 12(B)(6)

Defendant David J. Rushford, City Clerk of the city of
Worcester, ("Rushford" or "clerk") respectfully submits
this memorandum of law in support of his motion to
dismiss pursuant to Mass.R.Civ.P. 12(b)(1) and 12(b)(6)
on the grounds that mandamus does not apply to
discretionary acts of public officers and that the court
lacks jurisdiction because the plaintiffs lack standing
and they are not entitled to invoke the public right
doctrine and act as private attorneys general.

STATEMENT OF THE CASE

On May 26, 2004, plaintiffs filed a petition "Seeking Declaratory Judgment and Order in Nature of Mandamus" before the Supreme Judicial Court for Suffolk County. The petition names the city and town clerks of Provincetown, Somerville and Worcester as defendants and makes the same allegations against all three.¹ With respect to Defendant Rushford, the petition alleges that he "has refused to enforce" sections 12 and 20 of chapter 207 of the General Laws and, thereby, is "issuing marriage licenses to non-residents of Massachusetts who do not intend to reside in Massachusetts and whose state of residence prohibits or does not recognize same-sex marriage." (Pet. ¶ 24).

STATEMENT OF FACTS

For purposes of his motion to dismiss, Defendant Rushford concedes as true the factual allegations made in the petition and all reasonable inferences to be drawn therefrom in the plaintiffs' favor.

¹ On June 8, 2004, plaintiffs filed an amended complaint adding the city clerks of Attleboro and Fall River. All subsequent paragraph references are to the amended petition.

ARGUMENT

I. PLAINTIFFS' PETITION FOR AN ORDER IN MANDAMUS FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE MANDAMUS DOES NOT LIE TO COMPEL A PUBLIC OFFICER TO EXERCISE DISCRETION AND THE STATUTES GOVERNING THE ISSUANCE OF MARRIAGE LICENSES TO INDIVIDUALS FROM FOREIGN JURISDICTIONS PROVIDE RUSHFORD WITH A CONSIDERABLE MEASURE OF DISCRETION

"Relief in the nature of mandamus does not lie for discretionary acts." Matter of Electric Mut. Liability Ins. Co. Ltd. (No. 2), 426 Mass. 1007, n.1 (1998), citing Urban Transport, Inc. v. Mayor of Boston, 373 Mass. 693, 698 (1977); Lutheran Services Ass'n v. Metropolitan District Commission, 397 Mass. 341, 344 (1986) (mandamus not proper to compel public officials to make a determination whether to take plaintiff's property by eminent domain).

General Laws, chapter 207, section 35, second sentence, provides that a city or town clerk such as Rushford may: dispense with the statement of any facts required by law to be given in a notice of intention of marriage, if they do not relate to the or affect the identification or age of the parties, or a former marriage of either party, if he is satisfied that the same cannot without reasonable effort be obtained. G.L. c. 207 § 35.

The plaintiffs' entire case is grounded on the erroneous premise that the General Laws impose inflexible mandates on city and town clerks when issuing marriage

licenses. Paragraph 19 of their petition alleges that Rushford has a "clear legal duty: i) to ascertain where each applicant resides; (ii), if the applicant resides in another state, to ascertain whether the applicant intends to continue to reside outside Massachusetts; and (iii) if the applicant resides and intends to continue to reside outside of Massachusetts, to investigate to his satisfaction whether any legal impediment to marriage exists in the applicant's state of residence." (Complaint ¶ 19).

Section 35 eviscerates the plaintiffs' legal theory. It specifically says that the clerk may not make a decision on the domicile of the parties intending to marry. In so doing, it makes mandamus wholly inappropriate. Section 35 is extraordinary in its breath in that it expressly authorizes the clerk to act even though the law elsewhere requires otherwise. Further evidence of the discretionary nature of the clerk's authority in these matters comes from that portion of section 35 that defines the standard in terms of the satisfaction of the clerk.² While this discretion is not unbridled, it nevertheless vests the clerk with the

² Even § 12, the section of the marriage law that the plaintiffs present as ministerial, contains the element of discretion as it contains the concept of the "satisfaction" of the clerk in determining whether non-resident parties are prohibited from intermarrying in their home states.

authority to weigh the particulars of any given fact situation and render a judgment. This is the essence of discretion.

Plaintiffs make no mention of section 35 and give no argument explaining how mandamus would lie to compel a city clerk to do something in every case that the statute does not require him to do in certain cases. The court order sought by the plaintiffs would compel the clerk to make a determination of residency for every party in every notice of intention received. The mandamus order would be unrelenting and apply in instances where even reasonable efforts would prevent such a determination. That result conflicts irreconcilably with the clerk's statutory authority under section 35.

Also, "one might recognize previous judicial admonitions against expansive use of that extraordinary remedy in novel applications, Reading v. Attorney Gen., 362 Mass. 266, 269 (1972), as quoted in Doe v. District Attorney for Plymouth Dist., 29 Mass.App. 671, 675 (1991). Mandamus is "extraordinary" and may not be granted except to prevent "a failure of justice." Lynch v. Police Commissioner of Boston, 43 Mass. App. 107, 112 (1997), quoting Lutheran Services Ass'n v. Metropolitan District Commission, supra.

II. THE COURT LACKS JURISDICTION IN THIS CASE
BECAUSE THE COMPLAINT FOR DECLARATORY JUDGMENT
FAILS TO SHOW AN ACTUAL CONTROVERSY IN WHICH
THE PLAINTIFFS HAVE STANDING

The 'actual controversy' requirement for declaratory judgment actions brought under G.L. c.231A is a jurisdictional predicate empowering the court to hear the case. Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth, 425 Mass. 534 (1997). An actual controversy requires a plaintiff with standing, a definite interest in the matters in contention in the sense that his or her rights will be significantly affected by a resolution of the contested point. Bonan v. City of Boston, 398 Mass. 315 (1986).

Plaintiffs in the case at bar acknowledge that they have no standing. Rather, they allege (Pet. ¶4) to be acting under the "public right" doctrine, an exception to the standing requirement through which a citizen may "bring an action for relief in the nature of mandamus to 'procure the enforcement of a public duty.'" Tax Equity Alliance for Mass. v. Commissioner of Rev., 423 Mass. at 714, (citations omitted) quoting Sears v. Treasurer & Receiver Gen., 327 Mass. 310, 315 (1951); Parella v. Massachusetts Turnpike Authority, 55 Mass. App. 537, 539

(2002) ("Where the public right doctrine applies, the people are considered the real party in interest, and the individual plaintiff need not show that he has any legal interest in the result").

As an exception to the "concrete and particularized harm" required for considering requests for mandamus, the public right doctrine must be enforced rigorously and, thus, construed narrowly. Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth, supra, 549-550 (Because the public right doctrine is in "such obvious tension with ... the doctrine of standing, we are unwilling to extend it into new territory").

Most crucial, and most fatal to the case at bar, this doctrine applies only "where a public officer owes a specific duty to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer..." Parella v. Massachusetts Turnpike Authority, supra, at 539 (emphasis supplied), quoting Kaplan v. Bowker, 333 Mass. 455, 460 (1956). The public right doctrine has "always been limited to the enforcement of clear and unequivocal duties, such as election officials' duty to count ballots

correctly," Parella, supra, at 539, quoting Brewster v. Sherman, 195 Mass. 222, 225 (1907); and citing Brooks v. Secretary of the Commonwealth, 257 Mass. 91, 93-94 (1926) (the secretary of the commonwealth's duty to omit from the ballot an initiative question where the petition failed to describe the proposed law accurately).

As described in detail in the first section of this brief, there is no such clear and unequivocal duty here. Sections 12 and 35 of c. 207 provide the clerk with legal authority to make an inquiry into the question of domicile³ and, in some cases, to reach no conclusion. There is no 'specific duty' to the public which may be enforced by the attorney general or his surrogates. If any duty exists, it serves to benefit the two specific applicants for a marriage license, a legal relationship which is for same-sex couples now fundamental to the Natural Law in Massachusetts. Goodridge v. Department of Public Health, 440 Mass. 309 (2003). This is precisely

³ Plaintiffs' analysis uses the concept of residency, while section 11 describes domicile as it prohibits marriages by a party "residing and intending to continue to reside" in another state. Determining domicile involves "a myriad of tangible criteria" which is ordinarily a function of a trial judge, Fiorentino v. Probate Court, 365 Mass. 13, 21 (1974), but may also be a question for a jury to determine. Mooar v. Harvey, 128 Mass. 219 (1880) (Upon the issue of a change of domicile, the question of intent, when the party's testimony is contradicted by other evidence, is one of fact for the jury).

why no court should act in a case brought by anyone other than the two individuals with a personal stake in the outcome.

As the public right doctrine does not apply, the plaintiffs must show injury in fact, which by their own admission they cannot. Therefore, the plaintiffs' claim fails for lack of any standing.

CONCLUSION

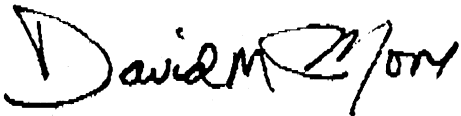
Defendant David J. Rushford respectfully urges the Single Justice to grant his motion to dismiss this action for the reasons stated above.

Respectfully submitted,

David J. Rushford, as City Clerk
of the City of Worcester,

Defendant.

By his attorney:

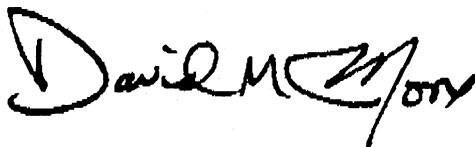


DAVID M. MOORE, BBO# 352850
City Solicitor
City of Worcester, Massachusetts
Worcester, Massachusetts 01608
Telephone: (508) 799-1161

June 15, 2004

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 15th day of June, 2004, I served a copy of Defendant David J. Rushford's Memorandum in Support of His Motion to Dismiss upon Plaintiffs by mailing the same to Philip D. Moran, Esquire, 265 Essex Street, Suite 202, Salem, Massachusetts 01970.



DAVID M. MOORE, BBO# 352850
City Solicitor
City of Worcester, Massachusetts
Worcester, Massachusetts 01608
Telephone: (508) 799-1161

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