

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

RAYMOND L. FLYNN
1 Flint Place
South Boston, MA 02127 and

THOMAS A. SHIELDS
122 Hart Street
Beverly Farms, MA 01915

Plaintiffs,

vs.

DOUGLAS JOHNSTONE, Clerk
Provincetown Town Hall
260 Commercial Street
Provincetown, MA 02657,

JOHN J. LONG, Clerk
Somerville City Hall
93 Highland Avenue
Somerville, MA 02143,

DAVID J. RUSHFORD, Clerk
City of Worcester
City Hall Room 206
455 Main Street
Worcester, MA 01608,

SUSAN FLOOD, Clerk
Attleboro City Hall
77 Park Street
Attleboro, MA 02703 and

CAROL VALCOURT, Clerk
1 Government Center
2nd Floor
Fall River, MA 02722

Defendants.

CASE NO. _____

**AMENDED COMPLAINT
SEEKING DECLARATORY
JUDGMENT AND ORDER
IN NATURE OF MANDAMUS**

Now come Plaintiffs Raymond L. Flynn and Thomas A. Shields and, for their Complaint against Defendants allege:

INTRODUCTION

1. This is a civil action pursuant to GL 231A, § 1 seeking a declaratory judgment that marriages contracted in violation of GL ch. 207, § 11 are null and void, and in nature of mandamus pursuant to GL ch. 249, § 5, to compel Defendants, in their capacity as Clerks of their respective jurisdictions, to perform their duties pursuant to GL ch. 207, §§ 12 and 20.

PARTIES

2. Plaintiff Raymond L. Flynn is a citizen and resident of the Commonwealth of Massachusetts.

3. Plaintiff Thomas A. Shields is a citizen and resident of the Commonwealth of Massachusetts.

4. Plaintiffs have in common with all citizens of the Commonwealth an interest in the enforcement of the laws of Massachusetts. Accordingly, Plaintiffs bring this civil action in the nature of mandamus on behalf and for the benefit of the public under the public right doctrine.

5. Defendant Douglas Johnstone has been duly elected to, and now holds and enjoys, the office of Clerk of the Town of Provincetown, Massachusetts.

6. Defendant John J. Long has been duly elected to, and now holds and enjoys, the office of Clerk of the City of Somerville, Massachusetts.

7. Defendant David J. Rushford has been duly elected to, and now holds and enjoys, the office of Clerk of the City of Worcester, Massachusetts.

8. Defendant Susan Flood has been duly elected to, and now holds and enjoys, the office of Clerk of the City of Attleboro, Massachusetts.

9. Defendant Carol Valcourt has been duly elected to, and now holds and enjoys, the office of Clerk of the City of Fall River, Massachusetts.

DEFENDANTS' DUTIES UNDER GL CH. 207

10. Town and city clerks are statutorily required to process applications for marriage licenses in the Commonwealth. G.L. ch. 207, § 19 requires that two persons desiring to be married must file a notice of intention to be married in the office of the clerk or registrar of any city or town in the commonwealth.

11. Pursuant to GL ch. 207, § 20, the clerk shall require written notice of intention to marriage

on forms furnished by the state registrar of vital records and statistics (hereafter, the "registrar").

12. The written notice is to be given before the clerk under oath by both of the parties to the intended marriage. GL ch. 207, § 20.

13. In addition to the notice of intention of marriage, "the town clerk shall also require the parties to furnish information required for a separate report to be transmitted to the state registrar, including the social security number and residence address of both parties and such other information as may be required by state or federal law." *Id.*

14. Chapter 207 contains a number of impediments to marriage in the Commonwealth, such as age and consanguinity, for instance. See GL ch. 207, §§ 1, 2 and 4.

15. One such impediment to marriage is set forth in GL ch. 207, § 11. That section provides:

No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

16. GL ch. 207, § 37 requires the commissioner of public health to furnish to the clerk or registrar of every town a printed list of all legal impediments to marriage, and the clerk or registrar to forthwith post and thereafter maintain the list in a conspicuous place in his office.

17. GL ch. 207, § 12 announces a clerk's duty to attempt to prohibit violation of § 11, stating:

Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.

18. GL ch. 207, § 20 further provides that "[t]he clerk shall require ... a statement of absence of any legal impediment to the marriage, to be given before such town clerk under oath by both of the parties to the intended marriage." The foregoing oath is in addition to the oath required in connection with the notice of intention to marry.

19. In other words, concerning the prohibition in section 11, a clerk has a clear legal duty to: (i) 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 the marriage exists in the applicant's state of residence, which investigation must include, but is not limited to, requiring the applicant to state under oath that no impediment exists.

**DEFENDANTS HAVE NOT AND DO NOT INTEND
TO FULFILL THE AFOREMENTIONED LEGAL DUTIES**

20. On or about May 10, 2004, the Town of Provincetown announced that

It shall be the policy of the Provincetown Board of Selectman that the Town Clerk may issue marriage licenses to any persons—whether residents of the Commonwealth of Massachusetts, *non-Commonwealth residents that intend to reside in Massachusetts, or non-Commonwealth residents that do not intend to reside in Massachusetts*—who complete the revised "Notice of Intention of Marriage" form prescribed by the Massachusetts Department of Public Health and affirm the following statement thereon: "*I have reviewed a list of impediments to marriage for my place of residence and hereby state that there is an absence of any legal impediment to the marriage and do hereby depose and say that all of the statements as set forth in the above notice whereof I could have knowledge are true and are made under the penalties of perjury ...*"

(Emphasis original.)

21. Upon information and belief, Defendant Johnstone and his employees and agents have refused to enforce GL ch. 207, §§ 12 and 20, and have issued 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. According to the Provincetown website, as of May 21, 2004, at least fourteen non-Massachusetts residents who do not intend to reside in Massachusetts had filed a Notice of Intention of Marriage. A waiver of the three-day waiting period was issued to one of the couples. See www.provincetowngov.org/goodridge.html (visited on May 26, 2004).

22. On or about May 13, 2004, the City of Somerville, by and through its Mayor, Joe Curtatone, announced that the City clerk would not be required to fulfill his statutory duties as set forth above.

23. Upon information and belief, Defendant Long and his employees and agents have refused to enforce GL ch. 207, §§ 12 and 20, and have issued 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.

24. Upon information and belief, Defendant Rushford and his employees and agents have refused to enforce GL ch. 207, §§ 12 and 20, and have issued 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.

25. Upon information and belief, Defendant Flood and her employees and agents have refused, and intend to continue to refuse, to enforce GL ch. 207, §§ 12 and 20, and are 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.

26. Upon information and belief, Defendant Valcourt and her employees and agents have refused, and intend to continue to refuse, to enforce GL ch. 207, §§ 12 and 20, and are 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.

27. There may be other Clerks who are refusing to enforce GL ch. 207, §§ 12 and 20, and are 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. In the event facts concerning such Clerks comes to light, Plaintiffs will amend their pleadings to add them as defendants.

WHEREFORE, Plaintiffs pray for judgment against Defendants and that the Court:

- A. Adjudge, decree and declare that marriages contracted in violation of GL ch. 207, § 11 are null and void, and that the Court retain jurisdiction of this matter for the purpose of enforcing the Court's Orders;
- B. Issue process against Defendants pursuant to GL ch. 249, § 5, returnable within 7 days compelling Defendants to fulfill their duties as established by and in accordance with GL ch. 207, §§ 12 and 20, as discussed above.
- C. Award Plaintiffs their costs and expenses, including reasonable attorney fees; and

D. Grant such other and further relief as the Court deems necessary.

Respectfully submitted,

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*Pending admission *Pro hac vice*